Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

SAMUEL WHITT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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July, 2001

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QUESTION PRESENTED

Whether the Seventh Circuit's refusal or failure to respond to this Court's certiorari remand order pursuant to *Apprendi v. New Jersey* so far deviated from the accepted and usual course of judicial proceedings as to deprive Petitioner Whitt of his Due Process rights and call for an exercise of this Court's supervisory power.

TABLE OF CONTENTS

Page

QUESTION PRESENTED..... i

TABLE OF AUTHORITIES..... iv

OPINIONS BELOW..... 1

JURISDICTIONAL STATEMENT..... 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED..... 3

STATEMENT OF THE CASE..... 4

A. Trial of Samuel Whitt..... 5

B. Sentencing of Samuel Whitt..... 7

C. District Court Opinion..... 9

D. Appellate Court Opinion..... 10

E. Unpublished 02/07/01 Seventh Circuit Order... 14

REASONS FOR GRANTING THE WRIT..... 15

I. THE SEVENTH CIRCUIT'S UNPUBLISHED ORDER IGNORES THIS COURT'S REMAND ORDER AND ACCORDINGLY SO FAR DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO DEPRIVE PETITIONER OF HIS RIGHTS TO DUE PROCESS UNDER THE LAW AND AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER. THIS COURT MUST EXERCISE ITS SUPERVISORY POWER IN LIGHT OF THE SEVENTH CIRCUIT'S FAILURE TO ADHERE ON REMAND TO THIS COURT'S HOLDING IN *APPRENDI V. NEW JERSEY* THAT THE AMOUNT OF DRUGS FOR WHICH PETITIONER WHITT WAS HELD RESPONSIBLE WAS A MATTER FOR JURY DETERMINATION..... 17

TABLE OF CONTENTS – Continued

Page

A. Introduction 17

B. District Court Removed An Essential Element of Proof 19

C. Apprendi v. New Jersey 20

D. Seventh Circuit's Failure to Follow Dictates of this Court 22

CONCLUSION 25

Appendix A A-1

Appendix B B-1

Appendix C C-1

TABLE OF AUTHORITIES

Page

CASES

Apprendi v. New Jersey, 530 U.S. ___, 120 S.Ct. 2348 (2000) ..... *passim*

Edwards v. United States, 523 U.S. 511 (1998)..... 22

Jones v. United States, 119 S.Ct. 1215 (1999)... 11, 17, 18

Talbott v. Indiana, 226 F.3d 866 (7th Cir. 2000) 22

United States v. Acosta, 85 F.3d 295 (7th Cir. 1996) 9

United States v. Aguaya-Delgado, 2000 Lexis 17243 (8th Cir. 2000)..... 24

United States v. Doggett, 230 F.3d 160 (5th Cir. 2000) 21

United States v. Henderson, 58 F.3d 1145 (7th Cir. 1995)..... 11

United States v. Mumford, 25 F.3d 461 (7th Cir. 1994)..... 11

United States v. Nordby, 225 F.3d 1053 (9th Cir. 2000)..... 21

United States v. Rodriguez, 73 F.3d 161 (7th Cir. 1996)..... 11

United States v. Whitt, 211 F.3d 1022 (7th Cir. 2000) ..... *passim*

PETITION FOR WRIT OF CERTIORARI

Petitioner Samuel Whitt respectfully prays that a writ of certiorari issue to review the unpublished judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled case on February 7, 2001.

OPINIONS BELOW

The initial opinion of the United States Court of Appeals for the Seventh Circuit, entitled *United States v. Whitt*, is reported at 211 F.3d 1022, and is included in the appendix attached hereto at page A-1. Following remand from this Court to the Seventh Circuit Court of Appeals for further reconsideration in light of *Apprendi v. New Jersey*, the February 7, 2001 Order of the Seventh Circuit, entitled *United States v. Whitt*, is included in the appendix attached hereto at page B-1. The Sentencing Memorandum and Order of the United States District Court for the Northern District of Indiana in this case, No. 95 CR 33, was issued on July 27, 1998. For this Court's convenience, the district court's Memorandum and Order is also included in the appendix at C-1.

JURISDICTIONAL STATEMENT

The instant petition constitutes Mr. Samuel Whitt's second application to this Court for a Writ of Certiorari.

This Court previously remanded the instant case to the Seventh Circuit Court of Appeals for further consideration in light of *Apprendi v. New Jersey*, 120 S.Ct. 2248 (2000). Following this Court's grant of certiorari on the basis of *Apprendi*, the Seventh Circuit issued an order on December 14, 2000, under Circuit Rule 54 requiring each side to file a statement of position. On January 19, 2001, the Seventh Circuit directed each side to file a supplemental memorandum. Following receipt of all requested materials, the appellate court rendered a decision on February 7, 2001, denying any relief under *Apprendi* or its progeny. This Court subsequently granted an extension of time within which to file a petition for writ of certiorari from May 08, 2001, to and including July 06, 2001. The instant petition follows from that unpublished February 7, 2001 Order.

Samuel Whitt was charged by indictment with conspiracy to possess with intent to distribute cocaine, a schedule II narcotic substance, in violation of 21 U.S.C. § 846. (R. 1).[1] The district court had jurisdiction over the original action pursuant to 18 U.S.C. § 3231. Following conviction for that offense, Petitioner was sentenced on April 16, 1999 to a term of life imprisonment.

Mr. Whitt filed timely Notice of Appeal on April 22, 1999 (R. 152). The United States Court of Appeals for the Seventh Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742. On May 1, 2000, the Seventh Circuit affirmed the judgment and order of the district

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[1] All notations to the record below shall again be designated "R. ___," followed by the appropriate docket entry.

court in *United States v. Samuel Whitt*, 211 F.3d 1022 (7th Cir. 2000). Petitioner Whitt did not seek a petition for rehearing in the Seventh Circuit. Instead, Petitioner filed a petition for writ of certiorari with this Court. That petition was granted and the case remanded to the Seventh Circuit for further consideration in light of *Apprendi v. New Jersey*. Following denial of relief to Petitioner Whitt on remand, he again seeks review of the February 7, 2001 Seventh Circuit judgment in this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment provides in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law."

The relevant statutory provision is found at U.S.S.G. § 1B1.3, under the heading ***Relevant Conduct (Factors that Determine the Guideline Range)***. It provides in relevant part that in calculating a defendant's base offense level under the Sentencing Guidelines, a district court is allowed to take into consideration any drugs that were "part of the same course of conduct or common scheme or plan as the offense of conviction." U.S.S.G. § 1B1.3(a)(2).

STATEMENT OF THE CASE

Petitioner Whitt was sentenced on April 16, 1999 to a sentence of life imprisonment. He was originally charged in a one-count indictment with conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C. § 846. A jury was selected on June 18, 1996. (R. 61). Trial commenced on that day, and the jury began its deliberations on June 19, 1996. (*Id.*). The jury returned a verdict of guilty on Count One on June 19, 1996. (*Id.*).

The indictment charged Mr. Whitt with conspiracy to possess with intent to distribute an unspecified quantity of cocaine. The genesis of the case occurred in 1992. Mr. Whitt was not charged with any criminal offense at that time. At that time, seven people were charged with drug conspiracy, including Ruby Lamb, her daughter Nicole Lamb, and her sister Helen Jackson. (June 18 Tr. II 111).[2] Following a jury trial, mother, daughter, and sister were all convicted of narcotics distribution. (June 18 Tr. II 132). Each received a substantial prison sentence. Ruby Lamb received a sentence of 24 ½ years. (October 27 Tr. 96). Nicole Lamb received a sentence of 11 years. (June 18 Tr. II 135). Helen Jackson received a sentence of 31 years. (June 18 Tr. II 174).

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[2] References to the trial and sentencing transcripts below will again include the date, volume number, if appropriate, and page reference.

A. Trial of Samuel Whitt

After sentencing, each of the three convicted narcotics dealers contacted the government and expressed an interest in testifying as a witness in a prospective case against Petitioner Whitt. (June 18 Tr. II 159, 160-62; October 27 Tr. 8-9). The underlying incentive involved a desire on the part of each to obtain prospective reductions in their lengthy prison sentences. (*Id.* at 160, 191-92; October 27 Tr. 112, 114). The convicted women did not come forward with the offer to testify until five years after conviction and some seven years after the incidents in question.

In exchange for testimony against Mr. Whitt, the government promised to file a "Rule 35" motion to reduce sentence on behalf of each defendant. (June 18 Tr. II 93-94), 133-35, 172-73; October 27 Tr. 8-10). The Rule 35 motions were open-ended, *i.e.*, unlimited in the scope of the proposed reduction in sentence. The record also indicates that the government agreed not to pursue re-sentencing of the defendants with likely firearm enhancements. (*Id.* at 92).

Ruby Lamb was an admitted narcotics dealer who had sustained multiple drug convictions by the time of her indictment. (October 27 Tr. 07). She ran a drug dealing organization. (*Id.* at 12). She recruited her daughter Nicole Lamb and her sister Helen Jackson into that organization. The conspiracy ended on September 5, 1991 following the execution of DEA search warrants on the residences of Ruby Lamb and Helen Jackson. (June 18 Tr. II 119). At the time of their arrests, neither Helen Jackson nor Ruby Lamb implicated Sam Whitt in any way. (June

18 Tr. II 119-121; October 27, Tr. 70-71). Instead, both denied any wrongdoing or knowledge of narcotics trafficking. (*Id.*). Petitioner Whitt's name was never even mentioned. And yet, a full five years after the original indictment, Samuel Whitt was indicted in connection with that conspiracy.

At Petitioner Whitt's trial, both Nicole Lamb and Helen Jackson testified against him. (June 18 Tr. II 130, 171). As Petitioner urged below, their trial testimony was replete with impeaching statements, glaring omissions, and material falsehoods. (June 18 Tr. II 137-45; 180-86; Def. Br. at 5-9). For example, Nicole Lamb failed repeatedly to recall any specific drug amounts, times, or places about or within which she claimed to have engaged in drug dealing with Mr. Whitt. (June 18 Tr. II 138-142).

In addition, Helen Jackson claimed to have kept a ledger with written notations she attempted to link to drug transactions involving Mr. Whitt. Yet the notations in that ledger failed to support her claims with respect to many crucial areas and time periods. (June 18 Tr. II 186-88, 213). Indeed, the notations failed in any way to inculpate Samuel Whitt. Moreover, Jackson repeatedly contradicted herself. For instance, although she testified that Whitt paid her $100 per day to store drugs, she squarely contradicted that testimony with an admission that she "never received any money for cocaine from Sam" Whitt. (June 18 Tr. II 186, 195, 201-02). Samuel Whitt was convicted of the charges, based almost entirely upon the above-referenced testimony.

At the trial's conclusion, the district court instructed the jury on the elements of the drug conspiracy. It did not

instruct that the jurors must find that Mr. Whitt knowingly entered a conspiracy to distribute a particular controlled substance or a specific amount of a particular controlled substance. The district court did not require the jurors to reach a unanimous agreement as to controlled substances *or weight* of the controlled substances.

B. Sentencing of Samuel Whitt

In addition to the testimony of Nicole Lamb and Helen Jackson, the government also provided the testimony of Ruby Lamb at the sentencing hearing. With this collective testimony, the government attempted to corroborate the drug quantity amounts it had alleged within the presentence investigation report ("PSI"), but not in the indictment.

In the PSI, the government alleged that Samuel Whitt should be held responsible for more than 111 kilograms of cocaine. It contended that the amounts set forth during the course of the trial demonstrated *only* the scope of Mr. Whitt's illegal drug dealing during the years 1990-91. PSI at 5, para. 21. The prosecution suggested that because it believed Samuel Whitt and Ruby Lamb had been involved in illegal drug activity since the late 1970's or early 1980's, the amounts set forth within the PSI did not adequately reflect Mr. Whitt's "total criminal conduct." *Id.* The government based it suggestion almost entirely on the estimates provided by Ruby Lamb, Nicole Lamb, and Helen Jackson. PSI at 3-5. Suffice it to say those witnesses were thoroughly and repeatedly impeached. Such inherently unreliable information, however, only aggravated the district court's constitutional error in sentencing Mr.

Whitt to a life sentence contrary to the dictates set forth in *Apprendi*.

Both Helen Jackson and Nicole Lamb testified at sentencing in reiteration of their trial testimony. Both again implicated Samuel Whitt within the conspiracy for which each had been previously convicted. (July 9 Tr. 166-89, 193-210). Nicole Lamb best summarized the collective motivation for testifying by stating "I am tired of being in prison and I'm tired of being away from my children." (*Id.* at 203). In his initial petition for Writ of Certiorari, Mr. Whitt fully set forth those facts at pp. 6 – 9. As the instant issue centers upon this Court's *Apprendi* decision, those facts will be hyphenated here.

Ruby Lamb was a completely unreliable witness. Even the district court expressed reservations regarding her testimony. (Appendix C at pp. 14-15). Not until she filed a Section 2255 petition in 1997 did she implicate Samuel Whitt in any narcotics activity. (October 27 Tr. 70). At that point, she had been in jail for approximately five years. (*Id.* at 71). She contacted the government and asked if there was anything she could do for herself. (*Id.* at 72). She had studied the law while in jail and informed the prosecutor that she was ready "to name Sam as the boss." (*Id.* at 72-75). At the conclusion of her testimony, Ms. Lamb admitted again that she was trying to help herself. (*Id.* at 101). She also agreed that she wouldn't have come to court unless she was deriving a benefit from it. (*Id.*).

Based upon the unsupported testimony of the above-referenced witnesses, the district court somehow reasoned that Mr. Whitt was responsible for a total of "in excess of 150 kilograms" during the charged time period

under a theory of "relevant conduct." (27 July 1998 Memorandum and Order, hereafter "Order" at Appendix C at 7). Accordingly, it assessed Mr. Whitt's base offense guidelines level at 38. (*Id.* at 14).

C. District Court Opinion

The district court reasoned that "Helen Jackson and the two Lambs testified about receiving a significant amount of cocaine on a weekly basis from the defendant and a lesser amount of heroin. Ruby Lamb's testimony explains the basis for defendant's possession of such narcotics." (Order at 14). The court continued "[i]n sum, with respect to the amount of drugs attributable to the defendant, this Court is of the view that defendant was responsible for distributing in excess of 150 kilograms of cocaine (let alone whatever the amount of heroin) which, for purposes of the sentencing guidelines is all that really matters since the guidelines top off at that level." (*Id.*).

Petitioner Whitt urged in his first petition below that Seventh Circuit standards provided that estimates of drug quantities attributable to a defendant were not permissible pre-*Apprendi* unless they were based on evidence possessing "sufficient indicia of reliability." *United States v. Acosta*, 85 F.3d 275, 282 (7th Cir. 1996). Those standards were ignored in the district court below.

In his Objections to the PSI and his Appellate Brief in the Seventh Circuit, however, Mr. Whitt also argued that the amount of drugs for which he was to be held responsible was a matter for the jury to determine, not the district court judge. (Objections at 8; *Whitt*, 211 F.3d at

1026, n.10). This argument, made prior to this Court's ruling in *Apprendi*, was rejected out-of-hand by both courts.

For purposes of sentencing only, to avoid additional relevant conduct, Mr. Whitt was willing to allow that he be held accountable for 3.5 kilograms of narcotics, based upon amounts charged. That is, Mr. Whitt acknowledged at sentencing that which was testified to at trial (yet never specifically found by the jury) in an attempt to limit alleged "relevant conduct" to the trial testimony. A jury never made *any* specific findings, however, as to *any* amount of drugs involved. And the district court rejected Mr. Whitt's acknowledgement. As the Seventh Circuit explained, in reaching the determination of 150 kilograms of cocaine, "the sentencing judge relied on the testimony of Ruby Lamb, stating that he believed her testimony despite the fact that she suffered a nervous breakdown in 1991 and that some of her testimony was shown to be incorrect." *Whitt*, 211 F.3d at 1026.

D. Appellate Court Opinion

Petitioner Whitt timely appealed the district court's ruling, arguing *inter alia* that the district court erroneously used unreliable information in determining the quantity of drugs attributable to Mr. Whitt. He urged the Seventh Circuit Court of Appeals to reverse and remand for re-sentencing because the district court had relied upon speculation, conjecture, and unreliable testimony in determining relevant conduct and imposing a sentence of life imprisonment.

Mr. Whitt urged that the district court did not base its finding on reliable evidence in the record and noted the case of *United States v. Rodriguez*, 73 F.3d 161 (7th Cir. 1996) (Posner, J., dissenting) in urging that due process required a heightened standard of proof of sentencing in cases where the issue is life imprisonment versus a much shorter term. (Def. Br. at 26-27).

Estimates of drug quantities attributable to a defendant must be based upon evidence possessing sufficient indicia of reliability and not "nebulous eyeballing." *United States v. Henderson*, 58 F.3d 1145, 1151 (7th Cir. 1995), citing *United States v. Mumford*, 25 F.3d 461, 467 (7th Cir. 1994). Although the district court and the Seventh Circuit paid deference to these standards, neither court followed them. As that issue was raised by Mr. Whitt in his previous Petition for Writ of Certiorari, he shall not rehash it here. Suffice it to say that this Court remanded back on the issue of compliance with *Apprendi*. Petitioner shall primarily concern himself with that issue.

Petitioner Whitt argued below that the amount of drugs for which he was ultimately held responsible was a matter for the jury to determine, not the district court judge. (Def. Br. at 13-25). Petitioner primarily based his argument upon this Court's opinion in *Jones v. United States*, 119 S.Ct. 1215, 1224, n.6 (1999) wherein this Court held that factors which increase the maximum penalty for a crime must be treated as elements of the offense, charged in the indictment, and proven to the jury beyond a reasonable doubt. In Whitt's case, the drug quantity was not treated as an element of the drug conspiracy charged in Count One, despite the fact that drug quantity increases the maximum penalty for 21 U.S.C. § 846.

Petitioner urged below and continues to urge under *Apprendi* that it was particular error in this instance to refuse to allow jury review of the amount of drugs. Here, Petitioner Whitt was initially charged in a conspiracy from December, 1990 to September, 1991 – *a ten-month time period.* From this, the district court at sentencing considered an additional *eleven years* as relevant conduct.

By the same token, Petitioner was charged only with seized amounts of drugs, *i.e.*, "more than 500 grams of cocaine." (R. 1). The jury *never even made a specific finding as to the issue of "more than 500 grams"* since the trial court instructed the jury that "[t]he quantity of the controlled substance alleged in the indictment is not an essential element of the crime charged, and the Government need not present any evidence of the amount or prove the amounts alleged in the indictment." (June 19 Tr. 60). Yet, from this, the sentencing court ultimately determined that Petitioner was responsible *for over 150 kilograms of cocaine.* Petitioner's maximum penalty under the charged indictment was forty years, with a minimum-mandatory ten-year sentence. *See* 21 U.S.C. § 846, et seq. In holding Petitioner responsible for the staggering additional quantities of cocaine, the district court's determination pushed the maximum penalty up to life imprisonment, a clear and flagrant violation of this Court's *Apprendi* holding.

The amounts for which Petitioner was actually convicted were minuscule in contrast to the amounts ultimately held against him under a lesser standard of proof. The time period embracing the indicted charges was but a fraction of the time ultimately deemed "relevant." Only at sentencing was Petitioner made to appear as a major

figure. If ever a case cried out for jury consideration of drug amounts, this was that case. Petitioner Whitt fully raised this issue in the appellate court below.

The Seventh Circuit rejected Petitioner's argument in a footnote as follows:

> Whitt also claims that the amount of drugs he is to be held responsible for is a matter for the jury. But because such an argument has specifically been rejected on numerous occasions by this court, *see, e.g., United States v. Jackson,* [citations omitted], we decline to consider this issue any further.

211 F.3d at 1026, n.10 (emphasis in original).

After the Seventh Circuit issued its opinion in *United States v. Whitt,* this Court issued its opinion in *Apprendi v. New Jersey,* 120 S.Ct. 2348 (June 26, 2000). There, this Court considered a state statute that enhanced punishment for prohibited firearm possession from 5 to 10 years to 10 to 20 years' imprisonment, if the crime was committed for the purpose of intimidating a person on the basis of race. The state statute did not make the race-motivation a separate crime, but merely a sentencing enhancement that need not be charged or proven to the jury beyond a reasonable doubt. 120 S.Ct. at 2353. This Court held that the state statute was unconstitutional. *Id.* at 2368-69. This Court announced the constitutional principle that "any fact (other than prior conviction) that increases the penalty for a crime beyond the prescribed statutory maximum must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Id.* at 2362-63.

Under *Apprendi,* the punishment-increasing quantities of §§ 841 and 846 must be construed as elements of a separate offense. Those directives were not followed here. Indeed, this Court remanded the case back to the Seventh Circuit for findings consistent with this Court's directive in *Apprendi* following issuance of a writ of certiorari. Yet rather than interpreting Petitioner's case in conformity with *Apprendi,* the Seventh Circuit ignored the holding and affirmed the life sentence in an unpublished order dated February 7, 2001.

E. Unpublished 02/07/01 Seventh Circuit Order Which Forms Basis of Instant Petition

After reiterating the facts, the Seventh Circuit first noted that "[n]ot until filing objections to the [PSI] did Whitt contend that the drug-quantity issue should have been submitted to the jury. That was too late to prevent the error's occurrence, and by delay Whitt forfeited (but did not waive) the point. Thus . . . we must affirm unless the sentence is plain error." Order at B-2. Yet the court clearly misstated and misconstrued the position taken by Mr. Whitt below to limit his relevant conduct at sentencing in order to arrive at an erroneous conclusion that plain error did not occur.

The court noted that "[o]n appeal, Whitt conceded that he is accountable for 3.5 kilograms of cocaine but argued that the district court judge should not have believed witnesses who testified to greater amounts." Order at B-2. Without explanation or analysis, the court continued "[t]hat concession demonstrates that plain error did not occur." *Id.* In an overly narrow reading of

this Court's recent *Apprendi* holding, the Seventh Circuit surmised that "all *Apprendi* governs is the amount that affects statutory maximum sentences. Once the trier of fact has found whatever facts are required to determine statutory minimum and maximum sentences, the sentencing judge selects a term within the statutory range based on a preponderance of the evidence." *Id.* at B-2 and B-3, citations omitted. "Because a reasonable jury was bound to find that Whitt conspired to distribute at least 500 grams of cocaine," the court concluded, "the task specified by the Supreme Court's remand order has been completed, and Whitt's conviction and sentence are again [affirmed]." *Id.* at B-3.

REASONS FOR GRANTING THE WRIT

Fundamental fairness compels this Court to provide desperately needed guidance through the grant of a writ of certiorari here. By virtue of the Seventh Circuit's effective refusal to follow the clear dictates of this Court in *Apprendi v. New Jersey* regarding the amount of drugs attributable to Mr. Whitt, the Seventh Circuit has deemed it to be a matter of no consequence. The record below demonstrates that the procedure utilized to impose a life sentence upon Samuel Whitt was in complete contravention to *Apprendi*.

The Seventh Circuit's Order notes that "[n]ot until filing objections to the [PSI] did Whitt contend that the drug-quantity issue should have been submitted to the jury. That was too late to prevent the error's occurrence, and by delay Whitt forfeited (but did not waive) the

point. Thus . . . we must affirm unless the sentence is plain error." Order at B-2. Yet the court clearly misstated and misconstrued a position taken by Mr. Whitt below in order to arrive at an erroneous conclusion that plain error did not occur at sentencing.

The Court noted that "[o]n appeal, Whitt conceded that he is accountable for 3.5 kilograms of cocaine but argued that the district court judge should not have believed witnesses who testified to greater amounts." Order at B-2. The court continued "[t]hat concession demonstrates that plain error did not occur." *Id.* The appellate court opined that "all *Apprendi* governs is the amount that affects statutory maximum sentences. Once the trier of fact has found whatever facts are required to determine statutory minimum and maximum sentences, the sentencing judge selects a term within the statutory range based on a preponderance of the evidence." *Id.* at B-2 and B-3, citations omitted.

"Because a reasonable jury was bound to find that Whitt conspired to distribute at least 500 grams of cocaine," the court concluded, "the task specified by the Supreme Court's remand order has been completed, and Whitt's conviction and sentence are again [affirmed]." *Id.* at B-3. Petitioner urges that the Seventh Circuit's Order runs contrary to this Court's ruling in *Apprendi*. He prays this Court remedy the situation by granting certiorari here. The Order has been decided in such a way as to utterly conflict with this Court's *Apprendi* decision. Such a conflict cannot be allowed to stand.

I.

THE SEVENTH CIRCUIT'S UNPUBLISHED ORDER IGNORES THIS COURT'S REMAND ORDER AND ACCORDINGLY SO FAR DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO DEPRIVE PETITIONER OF HIS RIGHTS TO DUE PROCESS UNDER THE LAW AND AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER. THIS COURT MUST EXERCISE ITS SUPERVISORY POWER IN LIGHT OF THE SEVENTH CIRCUIT'S FAILURE TO ADHERE ON REMAND TO THIS COURT'S HOLDING IN *APPRENDI V. NEW JERSEY* THAT THE AMOUNT OF DRUGS FOR WHICH PETITIONER WHITT WAS HELD RESPONSIBLE WAS A MATTER FOR JURY DETERMINATION.

Left unaltered, the Seventh Circuit's Order represents a serious erosion of the constitutional protections recently accorded by this Court. Left unaltered, this Court will allow the Seventh Circuit to ignore and contravene the standards clearly enunciated and upheld by this Court in *Apprendi v. New Jersey*.

A. Introduction

Petitioner Whitt argued below that the amount of drugs for which he was ultimately held responsible was a matter for the jury to determine, not the district court judge. (Def. Br. at 13-25). Petitioner primarily based his argument upon this Court's opinion in *Jones v. United States*, 119 S.Ct. 1215 (1999) wherein this Court held that factors which increase the maximum penalty for a crime must be treated as elements of the offense, charged in the

indictment, and proven to the jury beyond a reasonable doubt. In Whitt's case, the drug quantity was not treated as an element of the drug conspiracy charged in Count One, despite the fact that drug quantity increases the maximum penalty for 21 U.S.C. § 846.

In *Jones*, a case involving a car hijacking statute, this Court held that:

> [U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that *increases the maximum penalty* for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.

Jones v. United States, 119 S.Ct. at 1224, n.6 (emphasis supplied). In sum, Petitioner Whitt argued that *Jones* provided that factors which determined the maximum penalty available must be considered elements and therefore must be charged in the indictment and proven beyond a reasonable doubt to a jury. (Def. Br. at 18). Petitioner urged that drug type and quantity were elements of the relevant drug statutes under which he had been charged.

It was particular error in this instance to refuse to allow jury review of the amount of drugs. Here, Petitioner Whitt was initially charged in a conspiracy from December, 1990 to September, 1991 – *a ten-month time period*. From this, the district court at sentencing considered an additional *eleven years* as relevant conduct. By the same token, Petitioner was charged only with seized amounts of drugs, *i.e.*, "more than 500 grams of cocaine." (R. 1). From this, the district court at sentencing ultimately determined that Petitioner was responsible *for*

over 150 kilograms of cocaine. Petitioner's maximum penalty under the charged indictment was forty years, with a minimum-mandatory ten-year sentence. *See* 21 U.S.C. § 846, et seq. In holding Petitioner responsible for the staggering additional quantities of cocaine, the district court's determination pushed the maximum penalty up to life imprisonment.

B. District Court Removed An Essential Element of Proof From Jury Deliberation

The actions of the district court removed an essential element of the government's case from the purview of the jury. As Mr. Whitt urges below, the district court's determinations – never passed upon by a jury – were in clear violation of *Apprendi* and of constitutional magnitude.

At the close of the case, the district court instructed the jury in relevant part as follows: "The quantity of the controlled substance alleged in the indictment is not an essential element of the crime charged, and the Government *need not present any evidence of the amount or prove the amounts* alleged in the indictment." (June 19, Tr. 60) (emphasis supplied). Accordingly, **no** quantity of drugs – not even 500 grams – was ever proven to the jury beyond a reasonable doubt. To be sure, the indictment may have alleged "more than 500 grams." But the trial judge removed that essential consideration from the province of the jury. This was tantamount to an instruction that, as a matter of law, the element had been proven. Thus, contrary to the Seventh Circuit's assertion that "the jury was bound to find that Whitt conspired to distribute at least 500 grams of cocaine," the trial court directed the jury

that it was not to make any such finding involving quantity. Such an instruction entirely contradicts the Seventh Circuit's conjecture that a reasonable jury would have found 500 grams. It also runs directly contrary to the holding in *Apprendi.*

The amounts for which Petitioner was actually convicted were minuscule in contrast to the amounts ultimately held against him under a lesser standard of proof. The time period embracing the indicted charges was but a fraction of the time ultimately deemed "relevant." Only at sentencing was Petitioner made to appear as a major drug conspirator – and even there, only in the glare of completely unreliable testimony. Petitioner Whitt fully raised the issue of jury consideration of drug amounts in the appellate court below.

The Seventh Circuit rejected Petitioner's argument in a footnote as follows:

> Whitt also claims that the amount of drugs he is to be held responsible for is a matter for the jury. But because such an argument has specifically been rejected on numerous occasions by this court, *see, e.g., United States v. Jackson,* [citations omitted], we decline to consider this issue any further.

211 F.3d at 1026, n.10 (emphasis in original).

C. Apprendi v. New Jersey

After the Seventh Circuit issued its opinion in *United States v. Whitt,* this Court issued an opinion in *Apprendi v.*

New Jersey, 530 U.S. ___, 120 S.Ct. 2348 (June 26, 2000). There, this Court considered a state statute that enhanced punishment for prohibited firearm possession from 5 to 10 years to 10 to 20 years' imprisonment, if the crime was committed for the purpose of intimidating a person on the basis of race. The state statute did not make the race-motivation a separate crime, but merely a sentencing enhancement that need not be charged or proven to the jury beyond a reasonable doubt. *Id.* at 2352-53. This Court held that the state statute was unconstitutional. *Id.* at 2362. This Court announced the constitutional principle that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Id.* at 2362-63.

Post-*Apprendi*, there have been numerous arguments that drug type and quantity must be considered elements of the drug offenses. Lower courts that have addressed this argument so far have concluded that drug type and quantity must be proven to the jury. *See, e.g., United States v. Doggett*, 230 F.3d 160 (5th Cir. 2000) (drug quantity is an element of 18 U.S.C. § 844 where the amount would increase the prescribed statutory maximum); *United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000) (drug quantity is a sentencing factor which nevertheless must be given to the jury where the amount would increase the prescribed statutory maximum).

Following remand from this Court per *Apprendi*, the Seventh Circuit undertook to act in contrary fashion to this Court's mandate. Indeed, as Petitioner noted above, the Seventh Circuit erroneously speculated that the drug quantities assessed against Mr. Whitt need not have been

regarded as elements of the offense and proven to a jury because, inexplicably, "a reasonable jury was *bound to* find that Whitt conspired to distribute *at least* 500 grams of cocaine." Order at B-3. (Emphasis supplied). The court reasoned that because "on appeal, Whitt conceded that he is accountable for 3.5 kilograms of cocaine [, t]hat concession demonstrates that plain error did not occur." *Id.* at B-2. As this Court clearly held, speculation is no longer permitted insofar as statutory enhancing drug amounts are concerned. Neither did Mr. Whitt "concede" 3.5 kilograms in lieu of the jury's obligation to find any amounts beyond a reasonable doubt. The court clearly misstated and misconstrued a position taken by Mr. Whitt below in order to arrive at an erroneous conclusion that plain error did not occur at sentencing. Such a ruling virtually ignores the bright-line rule enunciated by this Court in *Apprendi.*

D. Seventh Circuit's Failure to Follow Dictates of this Court

In an overly narrow reading of this Court's recent *Apprendi* holding, the Seventh Circuit surmised that "all *Apprendi* governs is the amount that affects statutory maximum sentences. Once the trier of fact has found whatever facts are required determine statutory minimum and maximum sentences, the sentencing judge selects a term within the statutory range based on a preponderance of the evidence." *Id.* at B-2 and B-3, citing *Edwards v. United States,* 523 U.S. 511 (1998); *Talbott v. Indiana,* 226 F.3d 866 (7th Cir. 2000). "Because a reasonable jury was bound to find that Whitt conspired to

distribute at least 500 grams of cocaine," the court concluded, "the task specified by the Supreme Court's remand order has been completed, and Whitt's conviction and sentence are again [affirmed]." *Id.* at B-3.

Yet Petitioner conceded nothing except an amount for sentencing purposes. He never indicated that the amount found by the jury was or should have been 3.5 kilograms. He never conceded that those amounts were proven beyond a reasonable doubt. Clearly, given the jury instruction referenced above, *no* amount was ever proven beyond a reasonable doubt.

What Petitioner Whitt may have argued before the district court or the Seventh Circuit had no bearing upon post-*Apprendi* findings. This Court has indicated that *Apprendi* now constitutes the law of the land. While Mr. Whitt may have been willing to acknowledge 3.5 kilograms *by a preponderance of the evidence for pre-Apprendi sentencing purposes,* such an acknowledgement cannot now be twisted into a jury finding beyond a reasonable doubt! Such a contention borders upon the fanciful.

Even had Mr. Whitt made such a concession, he urges that it would be of no import here. Applying the Seventh Circuit's misguided reasoning, had Petitioner conceded that arson had taken place in his case as well, he might also well stand convicted of arson. Such a "concession" could not be utilized to advance the district court's position one iota. Indeed, no "concession" from Petitioner can cure an error of constitutional magnitude. The Seventh Circuit's analysis below was akin to blaming the robbery victim for carrying too much money. Petitioner Whitt's sentencing hearing was constitutionally deficient. The

amounts found by the district judge to have been relevant and reasonably foreseeable were required to have been *specifically pled to and proven beyond a reasonable doubt by the jury.* That was not done below. No amount of blaming Petitioner's counsel or conjecturing as to what a jury "was bound to find" can remedy the error.

At least one court has noted that "[i]f the government wishes to seek penalties in excess of those applicable by virtue of the elements of the offense alone, then the government must charge the facts giving rise to the increased sentence in the indictment, *and must prove those facts to the jury beyond a reasonable doubt." United States v. Aguayo-Delgado,* 2000 Lexis 17243 *17 (8th Cir. July 18, 2000) (emphasis original). This Court must again remand with similar instructions.

Apprendi requires that the jury determine quantity and amount whenever either of those factors increase the maximum potential sentence in a case. Although those factors clearly increased the maximum potential sentence below, the jury made no amount or quantity determinations whatsoever. Under 21 U.S.C. § 846, the maximum allowable penalty is twenty years imprisonment, with no mandatory minimum sentence. The existence or lack of a prior conviction only becomes relevant *after* a jury makes its required determinations. Indeed, if a jury fails to find the required amount or quantity, a potentially enhancing prior conviction becomes entirely moot. No such determinations were made by the jury here. Rather, the jury was expressly barred from making any specific determinations regarding amount or quantity.

Mr. Whitt contends that the Seventh Circuit failed to adhere to this court's ruling in *Apprendi.* He prays this Court remedy the situation by granting certiorari here. Under *Apprendi,* the punishment-increasing quantities of §§ 841 and 846 must be construed as elements of a separate offense. Petitioner prays this Court remand the case to the Seventh Circuit for findings consistent with this Court's directive in *Apprendi* following issuance of a **second** writ of certiorari. He prays this Court exercise its considerable supervisory power here. He prays this Court remedy a Seventh Circuit decision in direct conflict with this court's decision in *Apprendi.*

CONCLUSION

For any one or all of the reasons stated above, Petitioner Samuel Whitt respectfully prays that a writ of certiorari issue to review and remand the unpublished 07 February 2001 Order of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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Counsel of Record

APPENDIX A

United States Court of Appeals,
Seventh Circuit.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Samuel WHITT,
Defendant-Appellant.
No. 99-2017.

Argued Jan. 11, 2000
Decided May 1, 2000

David H. Miller (argued), Office of the United States Attorney, Fort Wayne, IN, for Plaintiff-Appellee.

Alexander M. Salerno (argued), Berwyn, IL, for Defendant-Appellant.

Before COFFEY, EASTERBROOK and EVANS, Circuit Judges.

COFFEY, Circuit Judge.

On December 20, 1995, a federal grand jury sitting in the Northern District of Indiana returned a one count indictment charging Samuel Whitt with conspiracy to distribute cocaine, in violation of 21 U.S.C. § 846. After a jury returned a guilty verdict, the judge sentenced Whitt to life imprisonment, five years' supervised release, and a $50 special assessment. On appeal, Whitt argues that: 1) the district court erred in not giving the jury an instruction on a multiple conspiracy; 2) the indictment was constitutionally defective because it did not specifically allege the type and quantity of controlled substances; and

3) the trial court erroneously calculated the quantity of drugs for which he was responsible. We affirm.

I. BACKGROUND

Although Whitt was not indicted until 1995, the genesis of the case occurred in 1992 when the government charged seven people, including Ruby Lamb (Ruby), Necole Lamb (Necole), and Helen Jackson (Helen),[1] with conspiring to possess and distribute cocaine. After Ruby, Necole, and Helen were convicted by a jury (counsel for the appellant informed this Court at oral argument that the other four were acquitted), they received lengthy prison sentences.[2] Understandably unhappy with the prospect of spending a considerable portion of their lives behind bars, the three women contacted the government and agreed to assist in the case against Whitt in exchange for reduced sentences.[3]

Although Whitt was not indicted until 1995, the joint federal, state, and local investigation of Whitt's and Ruby's criminal activities began in 1990. This investigation revealed that Whitt and Ruby were the organizers and leaders of a conspiracy to distribute controlled substances in the Northern District of Indiana; a conspiracy which distributed not only cocaine, but heroin and marijuana as well. And although Whitt was charged with a

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[1] Ruby and Helen are sisters and Necole is Ruby's daughter.

[2] Ruby received 24 1/2 years, Necole received 11 years, and Helen received 31 years.

[3] In exchange for their assistance, the government filed Rule 35 motions for a reduction in sentence on behalf of the three women.

conspiracy to distribute controlled substances between December 1990 and September 1991, the government believed that Whitt and Ruby had been involved in the illegal distribution of controlled substances since the late 1970's or early 1980's.

As the leader and organizer of this conspiracy, Whitt recruited Helen and Necole into the conspiracy for the purpose of storing cocaine and heroin at their residences and to distribute narcotics.[4]

A. The Drugs

Not only did Whitt recruit individuals to distribute narcotics for his operation, but he also personally supplied Necole and Ruby with cocaine for distribution. According to Necole, Whitt supplied her with the following amounts of cocaine for distribution from approximately June 1990 to December 1990: 1/2 ounce of cocaine three times a week, for a total of approximately one kilogram of cocaine during the last half of 1990.

Whitt also supplied Ruby with three to four bags of cocaine per week from 1990 through April 1991. Each bag

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[4] Necole testified that although she initially began to work for the defendant as a "runner," she later got on the inside of the operation and began to work directly with Whitt. Helen testified that she managed a "stash house" for the drug conspiracy at the request of the defendant; a task for which she received $100 a day. In addition to recruiting Helen and Necole, Whitt also recruited Lavon Chandler (his sister), John Starkes (his cousin), Samantha McCall, Sherrie Hatch, and Kay Shelton into his organization for the purposes of acquiring and distributing controlled substances.

contained the following quantities of cocaine: 10 – one ounce amounts; 10 – 1/2 ounce amounts; 10 – 1/4 ounce amounts; and 10 – 1/8 ounce amounts. Thus, Whitt supplied Ruby with approximately 57 ounces of cocaine per week; for a total, averaged over the whole period, of approximately 108 kilograms of cocaine.[5]

Not only did Whitt supply members of his organization with drugs, but he also, at times, sold narcotics directly to customers. During 1991, the investigative agents in this case used various informants to purchase 1/8 ounce quantities of cocaine from the defendant for approximately $200 a buy.[6]

B. The Money

Further supporting the government's contention that Whitt was involved in a large drug operation, law enforcement agents seized approximately $119,000.00 from Whitt and Ruby in March of 1990 while the two were at the Miami International Airport.[7] As the

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[5] During Whitt's trial, the government introduced Ruby's drug ledger which demonstrated, according to expert FBI testimony, that Whitt was responsible for an additional three kilograms of cocaine. The government therefore estimated that Whitt was personally responsible for the distribution of approximately 111 kilograms of cocaine between June of 1990 and September of 1991. This was in addition to the 1.6 kilograms of marijuana, the 262 grams of cocaine, and the 44.6 grams of heroin which was seized from his residence.

[6] These buys occurred on May 15, June 6, June 7, June 13, June 26, July 2, July 19, and September 3, 1991.

[7] The record does not reflect either how or why this money was seized.

sentencing judge concluded, Whitt has yet to offer a satisfactory explanation as to how the two of them came into possession of such a large sum of money, especially given the fact that neither he nor Ruby had a visible means of income.

In addition, on February 8, 1991, two of the individuals Whitt recruited into his operation, Lavon Chandler and John Starkes, Whitt's sister and cousin, respectively, were stopped near Daytona Beach, Florida, in Chandler's automobile.[8] After the two agreed to allow the officers to search the car, police discovered a suitcase containing $343,540.00 in the trunk of the vehicle.

During the course of the stop, Starkes and Chandler were placed in the back of a police squad car. As the two individuals were trying to decide upon an explanation for the money found in the trunk of their car, a hidden microphone in the squad car captured the following conversation between the two detainees:

> Chandler: Only thing I know is we just be quiet, quit acting crazy. When they ask, they said we had the right to remain quiet, tell 'em we don't want [to] talk cause we didn't do anything wrong.
>
> Starkes: But what attorney we gonna get?
>
> Chandler: We can deal with that when we get back home, now just say it's my money and we don't want to talk to nobody.

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[8] The record does not reflect why the vehicle was stopped.

Starkes: Say it's yours.

Chandler: It don't matter . . . if you wanna say it's mine you can.

Starkes: [Unintelligible]

Chandler: All I'm saying is we don't know.

Starkes: Okay. We should have talked to Sam. We should have talked to him and found out what to do if a situation like this came about.

Chandler: Promise me [unintelligible] don't want anyone to know.[9]

According to the PSR, Whitt offered this rather lame version of events surrounding the alleged conspiracy:

> Mr. Whitt contends that at no time between December of 1990 and September 4, 1991 [the dates charged in the indictment], did he join a conspiracy to distribute controlled substances. He indicates that he knew the participants who had been convicted previously of the conspiracy, but did not have them either working for him or conspiring with him to violate the controlled substance law. Mr. Whitt further cannot explain how his left thumb print was on two of the baggies in question. He indicates that it could have been when he visited Helen Jackson's residence and she cooked dinner for him which occurred on several occasions during the operative period. Mr. Whitt further contends that he

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[9] The government believes that this circumstantial evidence demonstrates that the currency belonged to the defendant-Samuel Whitt; and during the sentencing hearing, the judge, based upon the evidence presented, found that the currency belonged to Whitt.

> did not direct Helen Jackson or [Necole] Lamb in their drug dealing activities in any manner whatsoever. The drug ledger involved was kept in the hand of Helen Jackson and was kept for the purpose of keeping an account of her sister, Ruby Lamb's drug inventory.

After a two day trial, the jury found Whitt guilty of conspiracy to distribute cocaine. At Whitt's sentencing hearing, the government argued that the defendant was directly responsible, under the relevant conduct provision of the guidelines, for at least 607 kilograms of cocaine. The government, in reaching its drug calculation, relied heavily on Ruby's testimony concerning her trips to south Florida with Whitt to purchase cocaine. Ruby testified that between 1989 and 1992 she traveled with the defendant on thirty occasions to south Florida and purchased between 15 and 20 kilograms each trip. The government further argued that "for sentencing purposes the government would split the difference between these two numbers for an average of 17.5 kilograms of cocaine per each trip." Because Ruby testified that on one trip they purchased one hundred kilograms, the government asserted that the total amount Whitt was accountable for was at least 607 kilograms (17.5 x 29 trips = 507.5 kilograms + 100 kilograms = 607.5 kilograms).

Whitt, on the other hand, argued that "the undercover buys by the informants, the amount of drugs estimated in the ledger, the amount of drugs seized [from his residence], and the one statement by Ms. Lamb could form a reliable basis for determining the drug quantity in this case. Using that information, the drug quantity

would be approximately 3.5 kilograms – on the generous side."

The district court, in concluding that Whitt was responsible for over 150 kilograms of cocaine, determined that Whitt was

> conservatively responsible for approximately 21.2 kilograms. Additionally, defendant is responsible for the amount of drugs seized in the raid. Thus, to the above sums, must be added 44.6 grams of heroin, along with 1.6 kilograms of marijuana and 262 grams of cocaine which converts to [a] total [of] approximately 21.5 kilograms of cocaine.
>
> The figure, however, only takes into account the actual charged period of the conspiracy and a two month period when [Necole] Lamb resumed working for the defendant. . . . It does not, however, account for other relevant conduct.

In holding Whitt accountable for additional quantities of cocaine, the sentencing judge relied on the testimony of Ruby Lamb, stating that he believed her testimony despite the fact that she suffered a nervous breakdown in 1991 and that some of her testimony was shown to be incorrect.

As mentioned previously, Ruby testified that she and Whitt purchased 15 to 20 kilograms of cocaine on 30 different occasions between 1989 and 1991. Additionally she testified that she went to Los Angeles on five different occasions in 1990 to purchase "10 to 15 balls of black tar heroin." Given the large amounts of narcotics Ruby testified to, the sentencing judge stated that "[i]n sum,

with respect to the amount of drugs attributable to the defendant, this Court is of the view that defendant was responsible for distribution in excess of 150 kilograms of cocaine (let alone whatever amount of heroin) which, for the purposes of the sentencing guidelines is all that really matters since the guidelines top off at that level." Whitt appeals.

II. ISSUES

On appeal, we consider: 1) whether the district court erred by not giving the jury an instruction on a multiple conspiracy; and 2) whether the trial court erroneously calculated at sentencing the quantity of drugs for which Whitt was responsible.[10]

III. DISCUSSION

A. Multiple Conspiracy Jury Instruction

Normally, the finding of the existence of a single conspiracy is one that this court will overturn only for clear error. *See United States v. Narvaez*, 995 F.2d 759, 762 (7th Cir.1993). But, in this case, the defendant did not submit a multiple conspiracy instruction and we, therefore, review the issue of whether the trial court properly

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[10] Whitt also claims that the amount of drugs he is to be held responsible for is a matter for the jury. But because such an argument has specifically been rejected on numerous occasions by this court, *see, e.g., United States v. Jackson*, 207 F.3d 910, 920-21 (7th Cir.2000), we decline to consider this issue any further. *See also Edwards v. United States*, 523 U.S. 511, 513-14, 118 S.Ct. 1475, 140 L.Ed.2d 703 (1998).

gave only a single conspiracy instruction for plain error. *See United States v. Easley*, 977 F.2d 283, 285-86 (7th Cir.1992). In order to establish plain error, Whitt must demonstrate: 1) that error occurred; 2) that the error was plain; and 3) that the error affected his substantial rights. *See Johnson v. United States*, 520 U.S. 461, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997).

Whitt argues that the evidence does not support a finding of a single conspiracy; rather, he argues, the government presented evidence of multiple conspiracies. Whitt claims that the court's failure to instruct the jury on multiple conspiracies thus deprived him of his right to a fair trial because the jury may have found him guilty of a conspiracy separate from what was charged in the indictment.

But, we have long held that

> [w]hether a single conspiracy exists is a question of fact; consequently "[t]he jury gets first crack at deciding 'whether there is one conspiracy or several when the possibility of a variance appears.' " *United States v. Paiz*, 905 F.2d 1014, 1019 (7th Cir.1990) (quoting *United States v. Percival*, 756 F.2d 600, 609 (7th Cir. 1985)). This is because the jury's verdict must be interpreted as a finding that the government presented sufficient evidence to prove its indictment beyond reasonable doubt, and that is all that we require of the prosecution. The fact that the government's evidence might also be consistent with an alternate theory is irrelevant; the law does not require the government to disprove every conceivable hypothesis of innocence in order to sustain a conviction on an indictment proved

> beyond reasonable doubt. *United States v. Beverly*, 913 F.2d 337, 361 (7th Cir.1990); *United States v. Douglas*, 874 F.2d 1145, 1152 (7th Cir.1989). Consequently, "even if the evidence arguably establishe[d] multiple conspiracies, there [is] no material variance from an indictment charging a single conspiracy if a reasonable trier of fact could have found beyond a reasonable doubt the existence of the single conspiracy charged in the indictment." *United States v. Prince*, 883 F.2d 953, 959 (11th Cir.1989).

United States v. Townsend, 924 F.2d 1385, 1389 (7th Cir.1991); *see also United States v. Magana*, 118 F.3d 1173, 1188 (7th Cir.1997).

Upon review of the record, we hold that, contrary to the defendant-Whitt's argument on appeal, the evidence sufficiently supports the jury's finding of a single conspiracy. Specifically, the record established a single purpose, distributing controlled substances, including cocaine, in the Northern District of Indiana, to which Whitt, Ruby Lamb, Necole Lamb, and Helen Jackson all were committed. The evidence also demonstrates the manner in which the common goal was met; that is, Whitt and Ruby Lamb "stashed" and picked-up narcotics at Helen Jackson's house while Necole Lamb and others acted as drug runners at the direction of Whitt and Ruby. As cases like *Townsend* dictate, the fact that other theories of criminal conduct may also be supported by the record does not diminish the fact that, in this case, the evidence fully supported a single conspiracy instruction.

Whitt also complains that Necole Lamb testified to events outside the conspiracy charged in the indictment and that the jury may have therefore based his conviction

on criminal activity not charged in the indictment. However, Whitt ignores the fact that at the close of the evidence at trial the judge instructed the jury that:

> I want to instruct you, ladies and gentlemen, that you have just heard evidence of the acts of the defendant, other than those charged in the indictment and specifically if you've been following the dates here, they actually precede the commencement of the alleged conspiracy which was December of 1990. So you've just heard testimony about certain acts of the defendant that pre-date the opening of the conspiracy. *You may consider the evidence only on the question of the relationship between the witness and the defendant and others. This evidence is to be considered by you only for this limited purpose.*

(emphasis added). That is, the judge instructed the jury that it was to consider any evidence that pre-dated the opening of the conspiracy *only for the limited purpose* of establishing the relationship between the witness, the defendant, and other relevant individuals, and the jury is presumed to have followed the court's limiting instruction. *See Doe v. Johnson*, 52 F.3d 1448, 1458 (7th Cir.1995) ("Jurors are presumed to follow . . . instructions. . . . ") (citations omitted). Thus, the fact that Necole Lamb testified about her involvement with Whitt prior to the events alleged in the charged conspiracy does not establish a separate conspiracy. *See Magana*, 118 F.3d at 1188-89.

The record clearly supports a finding of a single conspiracy. Furthermore, Whitt never submitted a proposed multiple conspiracy instruction. Thus, we are convinced that the trial judge did not commit plain error in failing to instruct the jury on multiple conspiracies.

B. The Trial Court's Calculation of Drug Quantity

On appeal, Whitt asserts that he is responsible not for the 150 kilograms the sentencing judge attributed to him, but rather for 3.5 kilograms of cocaine. In so arguing, Whitt contends that the judge erred because he relied upon testimony which was unreliable and that the witnesses were not credible.

However, the guidelines require that

> When choosing the base offense level in a narcotics case, the district court must take into consideration not only the drug amounts involved in the offense of conviction, but any that were part of the same course of conduct or common scheme or plan as the offense of conviction. This Court reviews the sentencing court's calculation of the drug amount only for clear error. We must be satisfied, however, that the calculation is based on reliable evidence; speculation and unfounded allegations will not do.

United States v. Pigee, 197 F.3d 879, 889 (7th Cir.1999) (internal citations and quotations omitted).[11] Furthermore, "[w]e have frequently held that the trial judge is in the best position to judge the credibility of witnesses who offer conflicting testimony concerning the quantity of drugs attributable to a defendant for purposes of sentencing." *United States v. Pitz*, 2 F.3d 723, 727-28 (7th Cir.

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[11] Furthermore, a participant in a drug conspiracy is accountable for the "reasonably foreseeable quantities of contraband that were within the scope of the criminal activity that he jointly undertook." U.S.S.G. § 1B1.3, comment (n.2); *see also United States v. McEntire*, 153 F.3d 424, 438 (7th Cir.1998); *United States v. Mumford*, 25 F.3d 461, 465 (7th Cir.1994).

1993); *see also United States v. Mancillas*, 183 F.3d 682, 701 n. 22 (7th Cir.1999) ("We do not second-guess the [trial] judge's credibility determinations because he or she has had the best opportunity to observe the verbal and non-verbal behavior of the witnesses focusing on the subject's reactions and responses to the interrogatories, their facial expressions, attitudes, tone of voice, eye contact, posture and body movements, as well as confused or nervous speech patterns in contrast with merely looking at the cold pages of an appellate record." (citation omitted) (brackets in original)), *cert. denied*, ___ U.S. ___, 120 S.Ct. 1271, ___ L.Ed.2d ___ (2000).

As previously discussed, the court's opinion explained in detail the facts that it relied on to reach the 150 kilograms used at sentencing. All of these facts were gleaned from testimony which the sentencing judge deemed to be reliable and credible; specifically Ruby testified that she and Whitt purchased 15 to 20 kilograms of cocaine on 30 different occasions between 1989 and 1991, accounting for well over 150 kilograms of cocaine. Despite Whitt's urging that this court find the testimony of Ruby, Necole, and Helen incredible, the fact remains that the judge concluded, with full knowledge that Ruby had suffered a nervous breakdown and that some of her testimony was inaccurate, that her testimony concerning the amount of cocaine was reliable and accurate enough to hold Whitt responsible for in excess of 150 kilograms of cocaine; the maximum level under the guidelines.[12] We know of no convincing reason, nor has Whitt offered one,

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[12] We note that Necole and Helen testified at Whitt's trial and that the jury also found their testimony credible.

to overturn the district court's credibility determinations. Thus, we hold that the court did not commit clear error in determining that Whitt was responsible for 150 kilograms of cocaine.

The decision of the district court is

AFFIRMED.

APPENDIX B

Unpublished Order
Not to be cited per Circuit Rule 53

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

February 7, 2001

Before

Hon. JOHN L. COFFEY, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. TERENCE T. EVANS, Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division.
No. 99-2017 v.	
SAMUEL WHITT, *Defendant-Appellant.*	No. 95 CR 33
	William C. Lee, *Chief Judge.*

Order

The Supreme Court remanded this case to us for further consideration in light of *Apprendi v. New Jersey*, 120 S. Ct. Circuit Rule 54 requiring each side to file a statement of position. On January 19, 2001, we directed each side to file a supplemental memorandum. These have been received, and the case is ready for decision.

Whitt was sentenced to life imprisonment, following his conviction for conspiring to distribute cocaine. The

United States filed an information under 21 U.S.C. §851 pointing out that Whitt has prior drug convictions and is eligible to an enhanced sentence on that account. Under *Apprendi* these prior convictions need not be proved to a jury's satisfaction, but the quantity of drugs must be found, beyond a reasonable doubt, by the trier of fact, when quantity affects the maximum possible punishment under 21 U.S.C. §841. See *United States v. Nance*, No. 00-1836 (7th Cir. Dec. 29, 2000). Under 21 U.S.C. §841(b)(1)(B) a combination of conspiring to distribute a mixture or substance weighing more than 500 grams, and containing a detectable amount of cocaine, leads to maximum punishment of life imprisonment, provided that the defendant has a prior conviction for a felony drug offense, as Whitt does.

Not until filing objections to the presentence report did Whitt contend that the drug-quantity issue should have been submitted to the jury. That was too late to prevent the error's occurrence, and by delay Whitt forfeited (but did not waive) the point. Thus, as in *Nance*, we must affirm unless the sentence is plain error.

The district judge found that Whitt and his confederates distributed *at least* 150 kilograms of cocaine. The prosecutor contended that the total exceeded 600 kilograms but the district court had no reason to determine whether the total was higher than 150, an amount that (in conjunction with other considerations, such as Whitt's prior convictions and use of firearms) led to mandatory life imprisonment under the Sentencing Guidelines.

On appeal, Whitt conceded that he is accountable for 3.5 kilograms of cocaine but argued that the district judge

should not have believed witnesses who testified to greater amounts. His latest memorandum reiterates this position: "Based upon amounts charged and proven to the jury, Mr. Whitt urged (and continues to urge here) that the drug amounts directly attributable to him would be approximately 3.5 kilograms." That concession demonstrates that plain error did not occur. A reasonable jury would have been bound to find that Whitt conspired to distribute at least 500 grams of a substance containing a detectable amount of cocaine. No more is required, under *Johnson v. United States*, 520 U.S. 461 (1997), and *United States v. Olano*, 507 U.S. 725 (1993), to show that affirmance of Whitt's sentence would not be a miscarriage of justice, and thus that reversal for plain error would be inappropriate.

Whitt's appellate lawyer seems to be under the impression that *Apprendi* requires not just 500 grams, but the whole 150 kilograms, to be proved to the jury beyond a reasonable doubt. That is not so. All *Apprendi* governs is the amount that affects statutory maximum sentences. Once the trier of fact has found whatever facts are required to determine statutory minimum and maximum sentences, the sentencing judge selects a term within the statutory range based on a preponderance of the evidence. *See Edwards v. United States*, 523 U.S. 511 (1998); *Talbott v. Indiana*, 226 F.3d 866 (7th Cir. 2000). Because a reasonable jury was bound to find that Whitt conspired to distribute at least 500 grams of cocaine, the task specified by the Supreme Court's remand order has been completed, and Whitt's conviction and sentence are again

AFFIRMED

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. SAMUEL L. WHITT, Defendant.	)	1:95-CR-33 (Filed ___)

SENTENCING MEMORANDUM AND ORDER

This matter is before the Court on objections to the presentence report which was prepared in conjunction with the conviction of defendant, Samuel Whitt, for conspiracy to distribute controlled substances. Essentially, defendant objected to the presentence report insofar as the amount of drugs which were attributed to him; whether a firearm was properly attributed to him; his purported role in the offense; and the suggestion that the criminal history category under the guidelines may have under-represented the number of his convictions and arrests.

Evidentiary hearings on the objections to the presentence report were held by the Court on July 9, 1997 and October 27, 1997.[1] Defendant filed a "Brief and

[1] At the conclusion of the latter hearing, the government was given time within which to submit further evidence and a briefing schedule was entered taking into account that request. The time for submission of additional evidence was extended at

Memorandum in Support of Sentencing Arguments" on January 13, 1998. The government filed its sentencing memorandum on February 2, 1998 to which defendant replied on February 20, 1998.

Upon receipt of those briefs, this Court took the matter under advisement. During consideration of the materials submitted, several issues were determined by the Court to need further clarification. Because of that, this Court held a hearing on April 13, 1998 and presented several questions to the parties. They were then given an opportunity to present supplemental briefs addressing those issue. On April 28, 1998, the government filed its "Supplemental Sentencing Brief." On June 11, 1998, defendant filed a "Supplemental Sentencing Memorandum in Reply to the Government."

Discussion

On December 20, 1995, defendant was indicted by a grand jury on charges of conspiracy to distribute in excess of 500 grams of cocaine in violation of 21 U.S.C. § 846 and 18 U.S.C. § 2. The indictment alleged as follows:

> From on or about December, 1990, up to and including September 1991, in the Northern District of Indiana, and elsewhere:
>
> SAMUEL L. WHITT, a/k/a Sam Whitt
>
> defendant herein, did unlawfully, knowingly and willfully, conspire, combine, confederate and agree together and with other persons

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the government's request and accordingly, the briefing schedule was revised.

> known and unknown to the grand jury, to commit an offense against the United States, that is, to violate Title 21, United States Code, Section 841(a)(1) – distribution of controlled substances, including more than 500 grams of cocaine, a Schedule II Narcotic Drug Controlled Substance.
>
> All in violation of Title 21, United States Code Section 846 and Title 18 United States Code, Section 2.

After a two-day trial he was convicted of the charge by a jury on June 19, 1996.

In December 1996, a presentence report was forwarded to this Court. The base offense level was calculated at 36:

> **Base Offense Level**: The United States Sentencing Commission Guideline for violation of 21 U.S.C. § 846 is found in U.S.S.G. §2D1.1. According to the Offense Conduct section, this defendant's criminal activity included being involved in conspiracy to distribute an estimated 111 kilograms of cocaine. Furthermore, in a search of Mr. Whitt's residence, 44.6 grams of heroin was found along with 1.6 kilograms of marijuana and 262 grams of cocaine. The offense level specified in the **Drug Quantity Table** under U.S.S.G. §2D1.1(c)(2), sets a base Offense level of 36.

(PSR ¶ 27). To the base offense level, two points were added because "[d]uring a search of defendant's residence on September 5, 1991, two firearms were discovered." (PSR ¶ 28). Finding defendant to be "the organizer and leader of a conspiracy involving in excess of five individuals, an additional four points were added under

the heading "adjustments for role in the offense." (PSR ¶ 30). No points were reduced for acceptance of responsibility as defendant had denied his involvement in the offense. Hence, the adjusted offense level was determined to be 42 (36 + 2 + 4 - 0 = 42) (PSR ¶ 34). Because of an extensive criminal history, defendant was found to have 9 criminal history points placing him in criminal history category IV. (PSR ¶ 71).[2]

For its part, the government did not object to the presentence report. That may be due to the fact that the report basically takes into account the government's contentions regarding this defendant.

For example, with respect to the amount of drugs involved (including what it deemed relevant conduct), the government in its version of events provided the following narrative:

> During 1991 the investigative agents used various informants to purchase 1/8 of an ounce quantity from the defendant Samuel Whitt for approximately $200.00. These buys occurred on May 15, 1991, June 6, June 7, June 13, June 26, July 2, July 19, and September 3, 1991.
>
> During the Summer of 1990, Samuel Whitt supplied Necole Lamb with the following amounts of cocaine, 1/2 ounce three times a week, assuming Summer begins in June, there are 25 weeks to December; 1 1/2 ounces per week multiplied by

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[2] The presentence report also noted that the Court could consider an upward departure under §4A1.3 because the criminal history score did not adequately reflect the defendant's prior record. (PSR ¶ 108).

25 weeks totals 37.5 ounces. There are approximately 35 ounces in a kilogram. Thus, during the Summer of 1990 to December of 1990, Whitt provided Necole Lamb with approximately one kilogram of cocaine for her own distribution.

According to Necole Lamb, Samuel Whitt also supplied Ruby Lamb with three to four bags of drugs per week from 1990 through April of 1991. A bag would contain the following quantities of cocaine, (10), one ounce amounts, (10) 1/2 ounces; (10) 1/4 ounces; and (10) 1/8 ounce amounts, for a total of approximately 19 ounces of cocaine per bag delivered three times per week totals 57 ounces of cocaine per week.

There are approximately 35 ounces of cocaine in a kilogram. Converting the 57 ounces into kilograms is equivalent to 1.6 kilograms per week multiplied by 52 weeks per year totals 83.2 kilograms of cocaine supplied to Ruby Lamb in 1990.

For the period of January 1991 through April 1991 the defendant supplied Ruby Lamb with approximately the same amounts. Therefor, the 16 weeks between January and May 1991 at 1.6 kilograms per week totals 25.6 kilograms of cocaine. The total amount of cocaine distributed by the defendant during 1990 through April of 1991 is approximately 108 kilograms of cocaine.

During the trial of Ruby Lamb the government introduced expert FBI testimony that government's exhibit 21, the drug ledger, demonstrated for the period of June 27, 1991 up to September 5, 1991, approximately three kilograms of cocaine were acquired and/or distributed.

(PSR ¶¶ 11-16). Based on its calculations, the government in the Presentence Report indicated that it "estimates that the defendant distributed approximately 111 kilograms of cocaine between the Summer of 1990 and September of 1991, in addition to the 1.6 kilograms of marijuana, and 262 grams of cocaine and 44.6 grams of heroin which was seized from his residence." (PSR ¶ 16).[3]

With respect to the matter of the defendant being a leader or organizer, the government pointed to several individuals who it indicated were involved in defendant's drug operation. It asserted that defendant "and Ruby Lamb were the organizers and leaders of a conspiracy to distribute controlled substances in the Northern District of Indiana" (PSR ¶ 7), that he "recruited Mrs. Lamb's sister, Helen Jackson" (PSR ¶ 8), that he "also recruited Ruby Lamb's daughter, Necole Lamb." (PSR ¶ 9) and that "[i]n addition to the above individuals, Mr. Whitt also included his sister, Lavon Chandler, John Starkes, Samantha McCall, Sherrie Hatch and Kay Shelton in his organization to acquire and distribute controlled substances." (PSR ¶ 10).

As alluded to, the defendant has objected to the drug quantity calculation (from which the base offense level of 36 is derived); the two level enhancement for the firearms found in the residence; and the four level increase for his alleged role in the offense as an organizer or leader. He

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[3] As for the amount of drugs argued by the government, it also pointed to other factors (such as money found on defendant and others at different periods of time) which would support its position that its calculation accurately depicted the amount of drugs.

also objected to any upward departure based on the supposed inadequacy of the criminal history category IV. Each of those objections will be considered under separate headings.

Drug Quantity Calculation

"The base offense level for a narcotic offense is in part determined by the quantity of narcotics for which the defendant is accountable." *United States v. Windom*, 82 F.3d 742, 746 (7th Cir. 1996) (citing U.S.S.G. § 2D1.1(a)(3)). "The greater the quantity, the higher the offense level." *Id.*

"The rules of evidence do not apply and the sentencing judge is free to consider a wide range of evidence, including hearsay." *Id.* at 747 (citing, *United States v. Corbin*, 998 F.2d 1377, 1385 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 1124 (1994)). As was pointed out in *Windom*, however,

> . . . a defendant has a due process right to be sentenced on the basis of reliable information, and the relaxed standards at sentencing are somewhat in tension with that right. *United States v. Campbell*, 985 F.2d 341, 348 (7th Cir. 1993). We have resolved this tension by requiring that a defendant have a reasonable opportunity to rebut contested hearsay and that the contested hearsay be reliable. To succeed on a challenge the defendant must show that the information before the court was inaccurate and the court relied upon it. *Id; United States v. Musa*, 946 F.2d 1297, 1306 (7th Cir. 1991).

82 F.3d at 747. Hence, while "[e]stimates of the drug quantities attributable to the defendant are permissible, of course," those estimates must be based on "evidence possessing sufficient indicia of reliability and not 'nebulous eyeballing.' " *United States v. Howard*, 80 F.3d 1194, 1204 (7th Cir. 1996) (*quoting, United States v. Henderson*, 58 F.3d 1145, 1151 (7th Cir. 1995)).

In the present matter, as indicated, the government has indicated that the defendant is responsible for approximately 111 kilograms of cocaine for the period between the Summer of 1990 and September of 1991 together with 1.6 kilograms of marijuana, 262 grams of cocaine and 44.6 grams of heroin seized from his residence.[4] Defendant, on the other hand, in his response to

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[4] Those were the figures given to the probation office which it used to calculate the offense level. Subsequent to the most recent hearing, however, the government has indicated that defendant is responsible for distributing at least 607 kilograms of cocaine based upon Ruby Lamb's testimony about her trips with defendant to Florida to purchase cocaine. As the government argued in its most recent brief. Ruby Lamb indicated that between 1989 and 1992, she traveled on thirty occasions with defendant to south Florida to purchase cocaine and that "on each trip the defendant would purchase between 15 and 20 kilograms of cocaine." The government then indicates that "for sentencing purposes the government would split the difference between these two numbers for an average of 17.5 kilograms of cocaine per each trip." Because Lamb testified that on one trip they purchased 100 kilograms, the total amount of cocaine is 607 kilograms (17.5 kilograms x 29 trips = 507 kilograms + 100 kilograms = 607 kilograms). The government further asserts that the amount of cocaine distributed by the defendant during 1990 and April 1991 – about 108 kilograms – is a part of the 607 total kilograms purchased on the trips with Ruby Lamb.

the presentence report and in a brief to this Court has indicated that, "on the generous side" he should be attributed 3.5 kilograms.[5] Under the government's calculation, the base offense level would be thirty-six under defendant's calculation, the base offense level would be at the demarcation line between levels 28 and 30.

In this Court's view, conservatively, defendant is responsible for delivering in excess of 150 kilograms. That calculation is based upon the following.

Defendant sold 1/8 ounce quantities of cocaine to confidential informants on May 15, 1991, June 6, June 7, June 13, June 26, July 2, July 19, and September 3, 1991. In his letter to the probation office in response to the presentence report, the defendant has acknowledged that "the undercover buys by the informants . . . could form a reliable basis for determining the drug quantity in this case" and he has not subsequently argued otherwise. Those undercover buys total one ounce (8 x 1/8 oz.).

Additionally, the Court finds that the preponderance of the evidence shows that defendant was responsible for at least 21.26 kilograms of cocaine given to Ruby Lamb, Helen Jackson and Nicole Lamb for the period of the conspiracy and a brief time thereafter. That calculation, which is undoubtedly quite conservative, is based on his

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[5] Defendant in his objection to the presentence report indicated that "the undercover buys by the informants, the amount of drugs estimated in the ledger, the amount of drugs seized in the raids, and the one statement by Ms. Lamb could form a reliable basis for determining the drug quantity in this case. Using that information, the drug quantity would be approximately 3.5 kilograms – on the generous side."

delivering, once-a-week, a load containing 10 one-ounce, 10 1/2-ounce, 10 1/4-ounce, and 10 1/2-ounce bags to those individuals over 40 weeks. That amount is wholly supported by the following.

In a statement to officers investigating this matter, Helen Jackson indicated that defendant brought the following to her home for storage:

> I kept WHITT's drugs at my house from the end of 1990 through September 1991, and recall that WHITT delivered approximately one bag of drugs per week at my house. The drugs delivered contained the following approximately [sic] amounts of cocaine: 10 to 30 ounce bags, 10 to 30 half-ounce bags, 10 to 30 quarter-ounce bags, and 10 to 30 one-eighth ounce bags.

Additionally, during the sentencing hearing, Helen Jackson testified that approximately once a week from the end of 1990 until "we got busted" (September 5, 1991), defendant would bring by "30 halves, 30 quarters, 30 eight balls" to her house. Thus, by her testimony, defendant for at least an eight month period brought to her house weekly, anywhere from ten to thirty ounce, half-ounce, quarter ounce and eight ounce bags.

In a statement which she confirmed at the sentencing hearing, Nicole Lamb spoke to both her own, her mother's (Ruby Lamb's) and her aunt's Helen Jackson's dealings with the defendant:

> SAM WHITT had been supplying my mother with bags of drugs during 1989, but I do not know the amount. WHITT averaged providing three to four bags of drugs per week to my mother from 1990 through April 1991. A typical

bag contained the following amounts of cocaine: 10-one ounce containers, 10-one-half ounce containers, 10-quarter ounce containers and 10-one-eighth ounce containers. From approximately May 1991 through September 1991, WHITT provided the above approximate amounts to my Aunt, HELEN JACKSON.

* * *

In the Summer of 1990, WHITT brought over a kilo brick size of cocaine to my mother's house and broke it up in the following amounts: Ounces, half ounces, quarter ounces, and one-eighth ounces. He then placed them in plastic bags. This occurred in my presence.

* * *

In the Fall of 1992, I started working for WHITT again, selling cocaine to his customers. I did this for approximately two months and made approximately $100 per day. I conducted the drug deals the same way as before except that I kept the drugs at my house during this time. WHITT also provided the approximate same amount of drugs as before. After two months, I decided that I did not want to be involved with drugs and stopped selling them for WHITT.

Thus, Nicole Lamb's statement indicates that either her mother, or her aunt would receive (on a thrice weekly basis) 10-one ounce containers, 10-one-half ounce containers, 10-quarter ounce containers and 10-one-eighth

ounce containers and that later, she received the same amount in lieu of her aunt or mother.[6]

Having concluded that defendant was responsible for 10 one-ounce, 10 1/2-ounce, 10 1/4-ounce, and 10 1/8-ounce bags per week during this period, that amounts to 18.75 ounces per week. Given (at a minimum) the eight months from January until August of 1991 (when Helen Jackson or Ruby Lamb were storing the drugs) coupled with the two months in the Fall of 1992 (when Nicole Lamb indicated she resumed working for a brief stint for the defendant) and assuming four weeks per month, that totals 40

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[6] Both the drug ledger and Ruby Lamb's testimony generally support such amounts. Ruby Lamb testified at the sentencing hearing that when defendant would bring drugs to her or her sister's (Helen Jackson's) house, it would be in quantities of "eight balls, quarters and half ounces." She also indicated that the amounts of drugs supplied by defendant yielded from $7,000 to $8,000 a day. A review of the ledger which accounted for deliveries from the end of June to the beginning of November indicates that "Sam" or "Jake" (which Helen Jackson indicated that defendant was also known as) came by on at least four times (6/27/91 "30 1/2, 30 qt. & 30 8b"; 7/6/91 "12 qt., 10 1/2 & 16 8b"; 7/28/91 "16 1/2, 16 qt. & 16 8b"; 8/10/91 "30, 30, 30). Although on cross-examination during the sentencing hearing Helen Jackson conceded that the drug ledger accounted for the times that defendant came by, during trial she indicated that he had come by the day before the raid with a new load but that for some reason she did not note that in the ledger. Further, while the ledger contains entry of smaller amounts generally followed by names or initials, there are other quite large amounts, with no names next to them for which no explanation has been given (e.g. 6/30/91 "19 1/2, 25 qt. 23 8ball, 3R"). The discrepancies do not, in this Court's view, support the conclusion that the preponderance of the evidence would show a lesser amount.

weeks. For that period, therefore, defendant is conservatively responsible for approximately 21.2 kilograms.[7] Additionally, defendant is responsible for the amount seized in the raid. Thus, to the above sums, must be added 44.6 grams of heroin, along with 1.6 kilograms of marijuana and 262 grams of cocaine which converts to total approximately 21.5 kilograms of cocaine.

That figure, however, only takes into account the actual charged period of the conspiracy and a two month period when Nicole Lamb resumed working for defendant after the raid on Lafayette Street. It does not, however, account for other relevant conduct.

"In calculating a defendant's base offense level under the Sentencing Guidelines, a district court is required to take into consideration not only the types and quantities of drugs specified in the offense of conviction, but also

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[7] That calculation is based on the following. Forty weeks times 18.75 ounces equals 750 ounces. There are approximately 28.35 grams in an ounce and approximately 35 ounces in a kilogram. Hence for forty weeks at 18.75 ounces per week, defendant was responsible for approximately 21.2 kilograms (18.75 x 40 = 750 x 28.35 = 21,262/1000 = 21.2 or 18.75/35.25=53, 53 x 40 = 21.2).

Actually, this amount of cocaine, although it is supported by a preponderance of the evidence is probably far less than that actually involved during this period. As indicated, Helen Jackson indicated in her statement that defendant would bring by 10 to 30 ounce, half-ounce, quarter ounce and eight ounce bags. Nicole Lamb indicated that the 10 ounce, half-ounce, quarter ounce, and eight ounce bags were brought thrice weekly. Moreover, it does not account for the tar heroin purchased in Los Angeles or the tar heroin which Nicole Lamb indicated in her statement that she sold.

any drugs that were 'part of the same course of conduct or common scheme or plan as the offense of conviction. U.S.S.G. § 1B1.3(a)(2)' " *United States v. Acosta*, 85 F.3d 275, 279 (7th Cir. 1996) (citing, *United States v. Howard*, 80 F.3d 1194, 1202 (7th Cir. 1996); *United States v. Beler*, 20 F.3d 1428, 1431 (7th Cir. 1994); *United States v. Duarte*, 950 F.2d 1255, 1263 (7th Cir. 1991), *cert. denied*, 506 U.S. 859, 113 S.Ct. 174 (1992)). "A defendant need not be charged or convicted of carrying out these other acts." *Windom, supra* 82 F.3d at 746.

"When a defendant in a drug distribution case is sentenced on the basis of uncharged conduct pursuant to section 1B1.3(a)(2), the government's burden is two-fold: it must first prove by a preponderance of the evidence that the uncharged conduct bore the necessary relation to the offense of conviction, *see Duarte*, 950 F.2d at 1263-64; it must then establish the quantity of drugs involved in that conduct, also by a preponderance of the evidence, *see Beler*, 20 F.3d at 1431." *Acosta* at 279; *see also, Windom, supra* at 746 ("[t]he uncharged conduct need only be supported by a preponderance of the evidence"). Because, however, "a defendant is not automatically responsible under the relevant conduct guideline for all drug transactions revealed by the record." Seventh Circuit "cases require that when a district judge sets a defendant's base offense level by aggregating drug quantities from uncharged or unconvicted conduct, the judge must 'explicitly state and support, either at the sentencing hearing or (preferably) in a written statement of reasons, its finding that the unconvicted activities bore the necessary relation to the convicted offense.' " *United States v. Patel*, 131 F.3d 1195, 1203 (7th Cir. 1997) (citation omitted).

Ruby Lamb testified that she traveled to Florida with Sam Whitt on approximately 30 occasions from 1989 to 1991 to purchase cocaine. Generally, they would purchase 15 to 20 kilos at $18,500 per kilo.[8] She also testified that she went with defendant to Los Angeles on five occasions in 1990 to purchase 10 to 15 balls of black tar heroin from Mary Evans. This court believes Ruby Lamb's testimony in these regards.

The Court is not unmindful that some of Ruby Lamb's testimony was shown to be incorrect.[9] For example, she testified about sending back 100 kilogram via UPS. That amount (assuming 2.2 pounds per kilo) would weigh way above the limits that UPS would ship at that time. Nevertheless, the Court finds that she was attempting to be forthright and the Court has no doubts that she did in fact travel with defendant on numerous occasions in 1989, 1990 and early 1991 to purchase large sums of cocaine with the defendant and did, on a handful of occasions, travel with him to Los Angeles to purchase tar heroin. Even given defendant every benefit of the doubt that amount was in excess of 150 kilograms.

That defendant was dealing in cocaine in such a large amount is further borne out by other evidence which suggests that he had the financial wherewithal to purchase kilo quantities on a regular basis. For example,

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[8] The money would be shipped down ahead of time to defendant's uncle Sam Hatch.

[9] The Court is also fully cognizant that in 1991 Ruby Lamb suffered a nervous breakdown which she attributed to friction with the defendant. This Court does not find that fact as negatively affecting her credibility.

there is the matter of a traffic stop in Florida in which Lavon Chandler and Fred Starkes are stopped and some $340,000 is found in the trunk of the car. There is no doubt in this Court's view that that money was the defendants. There is also the matter of the time that defendant along with Ruby Lamb were stopped at the Miami airport and $119,000 was found: the reason for carrying such a large sum has yet to be credibly explained.[10]

Although defendant argues that he should not be held accountable for any conduct other than that for which he was convicted, this Court is of the view that there is a sufficient link between the transactions to which Ruby Lamb refered and the count of conviction. The Seventh Circuit "has said that whether the transaction is part of the same course of conduct as the offense of conviction depends upon 'the similarity, regularity and temporal proximity of the incidents.' " *United States v. Montgomery,* 31 F.3d 510, 516 (7th Cir. 1994) (quoting, *United States v. Cedano-Rojas,* 999 F.3d 1175, 1180 (7th Cir. 1993)). "Relevant considerations include whether similar parties were involved in each transaction, the geographical relationship, and any other relationship between the offense of conviction and the relevant conduct." *Id.*

From all indications, the trips about which Ruby Lamb testified were ongoing event and occured right up until at least the beginning of 1991. That is, there is at least somewhat of a temporal connection. *Compare, e.g., United States v. Wilson,* 31 F.3d 510, 516 (7th Cir. 1994)

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[10] Those episodes are discussed in detail in the section titled "Enhancement for Role in the Offense," *infra.*

(strong temporal link when four day period between events); with *United States v. Mulling*, 938 F.2d 1144 (4th Cir. 1992) (where uncharged conduct occurred six month before offense of conviction, temporal proximity "extremely weak").

Further, even if there is some delay between the offense conduct and that sought to be attributed via relevant conduct, however, that would not be fatal. "Although temporal proximity is a significant consideration in finding a course of conduct, a lapse between the prior conduct and the charged offense is not necessarily dispositive of the issue." *United States v. Cedano-Rojas*, 999 F.2d 1175, 1180 (7th Cir. 1993). "A respite is unlikely to be fatal in the finding of a course of conduct if the interruption was not the choice of the players." *Id.* For example, a two year delay between the time of the offense and the uncharged conduct was found not to be fatal in *United States v. Nunez*, 958 F.2d 196, 198 (7th Cir.), cert. denied, 113 S.Ct. 168 (1992) because the lapse resulted from the arrest and incarceration of one of the participants. Similarly, in *Cedano-Rojas*, a two year lapse was found not to be fatal where the distributor had lost his supplier and was having difficulty finding cocaine. 999 F.2d at 1180 (citing, *Nunez, supra; United States v. Santiago*, 906 F.2d 867, 873 (2nd Cir. 1990) (eight-month interruption due to arrest). In this case, here, there does not appear to have been much of a respite and, even if there were, it does not appear to have been at the behest of the participants.

Further, there is a similarity of conduct and regularity. Helen Jackson and the two Lambs testified about receiving a significant amount of cocaine on a weekly basis from the defendant and a lesser amount of heroin.

Ruby Lamb's testimony explains the basis for defendant's possession of such narcotics.

In sum, with respect to the amount of drugs attributable to the defendant, this Court is of the view that defendant was responsible for distributing in excess of 150 kilograms of cocaine (let alone whatever the amount of heroin) which, for purposes of the sentencing guidelines is all that really matters since the guidelines top off at that level. As such, his base offense level is 38.

Attributing the Firearms to the Defendant

The presentence report increased the base offense level pursuant to U.S.S.G. 2D1.1(b)(1) because two firearms, a loaded Star 9mm chrome handgun and a Smith and Wesson 12 gauge shotgun, were found during a September 5, 1991 search of the "defendant's residence." (PSR ¶ 28). Defendant has objected to this enhancement on the grounds that there was no proof that the residence involved, 2805 S. Lafayette Street, was his residence and further that even if it was his residence that there has been no showing that "these weapons were linked to the conspiracy because none of the members of the conspiracy made any references to the carrying of guns in connection with the conspiracy." (Rec. 126 p. 13).

For its part, the governments entire argument with respect to the enhancement for a weapon in its February 2, 1998 sentencing memorandum was as follows:

> 1. Testimony of Helen Jackson that the defendant lived at 2805 S. Lafayette Street with Kay Shelton.

2. Testimony of Nicole Lamb that the defendant lived at 2805 S. Lafayette Street with Kay Shelton.

3. Taped telephone calls to the defendant at 2805 S. Lafayette Street between May 1991 and September 1991 by a confidential informant for the purpose of setting up drug sales. Surveillance of the defendant leaving 2805 S. Lafayette Street to make drug sales to the confidential informant.

4. Testimony of former Fort Wayne Police Narcotics Officer Marquardt that he and other officers conducted loose surveillance of the defendant from seven or eight o'clock in the morning until two or three o'clock the following morning and the defendant left 2805 S. Lafayette Street and returned to the same location.

5. Government Exhibit 41-photographs of the defendant's automobiles located parked in front of the garage located at the rear of 2805 S. Lafayette Street.

6. Numerous intercepted telephone calls by the defendant on the telephone located at 2805 S. Lafayette Street pursuant to the authorized wire tap, Government Exhibits 35, 36, 43C, 44C and 45A.

This evidence supports the defendant' possession of firearms at a location from which he was storing and selling controlled substances including cocaine and heroin.

(Rec. 125 p. 12).

Defendant then pointed to evidence which would suggest that he did not live at 2805 S. Lafayette Street. That evidence included:

– Testimony that defendant had several girlfriends and keys to their houses, "thereby negating the proposition that Whitt had a residence of his own" but instead suggesting that he "was spreading himself around rather than residing at a single location."

– Testimony from the FBI agent who had investigated defendant that despite the fact that a lot of physical evidence was recovered, nothing in the inventory of items seized had listed 2805 S. Lafayette as an address for the defendant.[11] In fact, in a wiretap application, that agent listed defendant as residing at an address at 4425 S. Monroe while listing Kay Shelton at 2805 S. Lafayette Street.

– Despite surveillance and confidential information spanning two years, the FBI Special Agent testified that the weapons were in concealed places and that defendant was never observed going in the kitchen cabinet or garage from where the guns were recovered.

(Rec. 126, pp. 11-13).

In its most recent filing, the government has amplified its argument regarding the reasons why a two level increase should be added to defendant's offense level. Essentially, it is the government's position that because the evidence shows defendant resided at 2805 S. Lafayette Street and because it shows that defendant was

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[11] For example, the addresses on defendant's checks and his telephone disconnect notice were for 3010 S. Lafayette Street. The mobile telephone bill had an address of 3022 McKinley.

distributing narcotics from that location, the enhancement is appropriate.

"The enhancement for weapons possession is applicable where the defendant is accountable for the possession of a weapon by a co-conspirator during drug trafficking conduct relevant to the offense of conviction . . . " *United States v. Mumford,* 25 F.3d 461, 468 (7th Cir. 1994). "A defendant's offense level may be enhanced under Guideline § 2D1.1(b)(1) if (1) a co-conspirator possessed a firearm during acts in furtherance of the conspiracy; and (2) the co-conspirators possession of the firearm was reasonably foreseeable to the defendant." *United States v. Vold,* 66 F.3d 915 (7th Cir. 1995).

In this Court's view, the preponderance of the evidence shows that defendant was living at the residence on Lafayette street. At least two people have indicated that he lived there with his girlfriend.[12] Informants called there to make the initial foray to purchase drugs. He was seen coming and going from that residence in response to those calls.

The return of the search warrant for the residence at 2805 South Lafayette Street further supports the notion that defendant was residing there. Among other things,

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[12] The Court notes that both of those witnesses indicated that defendant also resided elsewhere. Helen Jackson indicated that defendant was living with her sister and with Kay Shelton on Lafayette Street. Nicole Lamb testified that he was "between houses" meaning that he lived at the Lafayette Street location and with her mother and with Samantha. Ruby Lamb, when asked where defendant lived during the period of 1989-1991 testified that he lived with Kay Shelton at 2805 Lafayette Street.

law enforcement officers found a check book in the name of the defendants; Western Union receipts with defendant's name on them; a jeweler's receipt in defendant's name; a state court record indicting that charges had been dismissed against the defendant; a receipt for vehicle repairs in defendant's name; and a bag containing numerous cards and letters from the defendant to his wife and children. Such factors clearly support this Court's conclusion that the preponderance of the evidence shows that defendant resided at 2805 South Lafayette Street.

While it may be true that defendant stayed elsewhere, or to use his words "spread himself around," that does not answer the question of where he lived. Really it poses more questions than it answers: did he live at 3010 S. Lafayette as his checks and telephone disconnect notice suggested?; or did he live at 3022 McKinley which the mobile telephone bill would suggest?; or did he live with Kay Shelton as two people and surveillance suggested?; or did he live with Samantha McCall or any of several others who he is said to have fathered children with? Or did he live somewhere else entirely? The problem with the argument that defendant "spread himself around rather than residing at a single location" is that, taken to its logical extreme, defendant would not be responsible for the enhancement even if a gun used as part of the conspiracy was found at each location because the defendant could simply claim that each location was not his "residence."

Apart from arguing that he did not reside at 2805 S. Lafayette, defendant asserts that there should be no enhancement because the weapons found at that location

were not linked to the conspiracy to distribute narcotics. While defendant concedes that "the Seventh Circuit has recognized that firearms and trafficking go hand in hand," citing *United States v. Banks*, 987 F.2d 463, 468 (7th Cir. 1993), he goes on to point out that "they have never held that the mere risk involved in a drug conspiracy established the reasonable foreseeability of a concealed firearm for purposes of the sentencing guidelines" citing, *Vold, supra.* For that proposition, defendant relies exclusively on *Vold.*

In this Court's view, *Vold* does not aid defendant. That case dealt with cookers of methcathinone.[13] One such cook was Cox who formed a partnership with Vold. Those two were involved in at least four "cooks" and at each Goss was present. Goss was interviewed by police about two months after the last cook and told the police that "Cox always carries a . . . handgun with him" and that "he would rather shoot it out with police than be arrested." About a week later, Cox was questioned by police outside of Vold's residence. At that time Cox was not carrying a weapon, although one was found in his trailer later that day. Both Cox and Vold were charged with conspiracy to manufacture methcathinone. Upon conviction Vold objected to an enhancement for possession of a firearm which had been imposed by the district court.

On appeal, the Seventh Circuit found that the district court's finding that Cox's possession was reasonably

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[13] Methcathinone has a chemical structure similar to methamphetamine.

foreseeable to Vold "based upon the use of the weapon and the knowledge that weapons are used in this type of criminal activity" to be clearly erroneous. With respect to the former finding, the record suggested that while Goss was present during all four "cooks" involving Cox and Vold, she did not state that Cox possessed a firearm during any of these "cooks." *Volpe* at 920. Any assumption to the contrary was unwarranted because another witness told the government that although Cox possessed a firearm at a prior "cook," he did not see any firearms while he and Cox and Vold manufactured methcathinone in Cox's trailer. *Id.* at 921.[14] As for the second finding, the Seventh Circuit indicated that even if Goss's statement was sufficient to establish Cox's possession of the handgun during the conspiracy, the government failed to establish that said possession was reasonably foreseeable to Vold since their was "no evidence that Cox fired or brandished the derringer in Vold's presence, or that the derringer was anything but concealed while Cox and Vold were together." *Id.*

It would appear that in the present case, defendant would have this Court read *Vold* as requiring that in all cases, the government must establish that the firearm must be fired or brandished or must show that it was not concealed in order for the enhancement to apply. This Court does not read that case that broadly.

Closer to home in this Court's view is the Seventh Circuit's decision in *United States v. Banks,* 987 F.2d 463

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[14] Moreover, Cox was not carrying a firearm when he was questioned by police officers outside of Vold's residence. *Id.*

(7th Cir. 1993). In that case, defendant was charged with maintaining a crack house. When the police searched his home, they discovered a gun in the kitchen. Although it turned out that the gun belonged to a tenant, it also turned out that the tenant helped operate the crack house. Defendant was held equally responsible for possessing the gun and given an enhancement. On appeal, defendant asserted that he could not have " 'possessed' the gun because there was no evidence linking him to the gun or the gun to the crime" and argued "that in the context of drug-house prosecutions under § 856 some nexus between the defendant's possession of the weapon and the offense ought to be required." *Id.* at 467.

In rejecting that argument, the Seventh Circuit wrote:

> The weight of authority opposes Banks' position. Several Courts have held that when a house serves as the situs of an ongoing drug crime and guns are found within the house, those committing the crime may be held accountable for possessing the guns. *See United States v. Pelligrini*, 929 F.2d 55, 56 (2nd Cir. 1994) (enhancement proper for gun present in house where drugs were stored and deals were arranged; *United States v. Duncan*, 918 F.2d 647, 651 (6th Cir. 1990) ('The cases are all consistent in that they recognize that enhancement is appropriate if a weapon is found in the residence where the drug transaction occurs'). *United States v. McKeever*, 906 F.2d 129, 134 (5th Cir. 1990) (where entire house used to process drugs, it was logical to infer that eight firearms were there to protect unlawful activity), *United States v. Wayne*, 903 F.2d 1188, 1198 (8th Cir. 1990) (enhancement upheld for guns found in

> home from which defendant conduced narcotics activities); *United States v. Franklin*, 896 F.2d 1063, 1065-1066 (7th Cir. 1990) ('mere presence' of handguns at home, which was base of drug activity, was enough to justify enhancement). *But see, United States v. Apple*, 915 F.2d 899, 914-14 (4th Cir. 1990) ('[T]he [Sentencing] Commission did not intend that the mere fact that a weapon was found in the home of the defendant is necessarily sufficient for enhancement under [§ 2D1.1(B)(1)].'

Id. at p. 468.[15] *See also, United States v. Ortega*, 94 F.3d 764, 768 (2nd Cir. 1996) (enhancement available where defendant constructively possessed the weapon by having dominion or control over the item itself, or dominion over the premises where weapon located or other's possession of firearm was reasonably foreseeable to defendant).

Here, with the conclusion that defendant resided at 2805 S. Lafayette Street and the showing that drugs were stored there, it follows under *Banks* that defendant should be held responsible for the firearms discovered in the residence. Accordingly, the two level enhancement under § 2D1.1(b)(1) is appropriate under that line of authority.

Moreover, because "[s]ection 2D1.1(b)(1) of the Sentencing Guidelines provides a two level enhancement of a defendant's offense level if the defendant possessed a firearm during the commission of a drug crime," *United*

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[15] Although *Banks* involved possession of a firearm in the context of a prosecution for running a drug house, the cases upon which it relies involved possession and/or distribution charges.

States v. McClinton, 135 F.3d 1178, 1192 (7th Cir. 1998) and because the relevant note to the guidelines indicates that "[t]he adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense," U.S.S.G. § 2D1.1, note 3, "[t]he government, therefore, is not required to demonstrate a connection between the weapon and the offense." *United States v. Wetwattana*, 94 F.3d 280, 283 (7th Cir. 1996). "Rather, the government need only prove that the weapon was possessed during the offense of conviction or during related 'relevant conduct,' as defined in U.S.S.G. § 1B.1.3." *Id.* "Review is not limited to the evidence dealing with the proximity of the gun and the drugs at the specific time of the arrest; rather [it must be determined] whether the gun was possessed during the offense, i.e., during the course of the conspiracy." *United States v. Cantera*, 995 F.2d 1407, 1412 (7th Cir. 1993).

Here, it cannot be said that it was clearly improbable that the weapons found during the search was not connected with the offense. Surveillance placed defendant at the residence. Sales of narcotics were made after he left that residence and indeed the handgun and shotgun were seized from the residence three days after the last drug transaction with the confidential informant. The search that revealed the weapons also produced controlled substances. Hence, the probation office did not err in assessing a two point enhancement for the firearms.

Enhancement for Role in the Offense

The presentence report also recommends an enhancement for defendant's rule in the offense pursuant to

U.S.S.G. § 3B1.1(a) because "Mr. Whitt was the organizer and leader of a conspiracy involving in excess of five individuals." (PSR ¶ 30). Because of that, his base offense level was increased four points.

The Sentencing Guidelines provide for an increase in a defendant's base offense level if he had an aggravating role in the commission of the offense:

> Based on the defendant's role in the offense, increase the offense level as follows:
>
> (a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.
>
> (b) If the defendant was a manager or supervisor (but not organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.
>
> (c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

U.S.S.G. § 3B1.1. The defendant asserts the government has failed to show that he was an organizer or leader of a criminal activity that involved five or more participants and has failed to show that the activity was otherwise extensive. Upon full review of the record, this Court is of the view that the preponderance of the evidence supports a conclusion that the defendant's offense level should be enhanced by four levels because he was an organizer or leader under § 3B1.1(a).

As indicated, "[u]nder U.S.S.G. § 3B1.1, a defendant will have his offense level increased by four levels if he was 'an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive.' " *United States v. Adams*, 125 F.3d 586, 597 (7th Cir. 1997). "This [the Seventh] Circuit has held that to merit a four-point enhancement for one's leadership role under § 3B1.1(a), when the criminal activity involved five or more participants, the defendant must have had control, direct or indirect over at least four other participants in the offense" and the term control is to be used "in a broad sense to mean some kind of supervisory or organizational role with respect to those participant." *United States v. Magana*, 118 F.3d 1173, 1203 (7th Cir. 1997) (citing, *United States v. Hall*, 109 F.3d 1227, 1234-35 (7th Cir. 1997).

"In determining whether a defendant is an organizer or leader, courts consider a defendant's exercise of decision making authority, the nature of his participation in committing the crime, his recruitment of accomplices, his claimed right to a larger share of the criminal proceeds, his exercise of control and authority over others and the nature and scope of the illegal activity." *McClinton, supra*, 135 F.3d at 1191, *accord, United States v. Emerson*, 128 F.3d 557, 562 (7th Cir. 1997). "Not all of these factors need be present, however, for a court to enhance a sentence under § 3B1.1." *Id.* (citing, *United States v. Akinrinade*, 61 F.3d 1279, 1289 (7th Cir. 1995).

In its sentencing briefs, the government argued that defendant controlled the activities of Ruby Lamb, Helen Jackson, Nicole Lamb, Lavon Chandler, Samantha

McCall, Dezzie Burson, and Sam Hatch. A close inspection of the evidence proffered in support of that contention suggests that defendant was a leader or organizer with respect to at least the first five listed individuals.[16]

This Court is of the view that there can be no doubt that defendant was indeed the leader or organizer with respect to Ruby Lamb, Helen Jackson and Nicole Lamb. Helen Jackson testified in the sentencing hearing that "her role was that she held drugs for defendant in her home and defendant would bring buy a bag containing "30 halves, 30 quarters [and] 30 eight balls" once a week and that for her efforts she was paid "$100 a day." In a statement, Nicole Lamb related her own experience with the defendant:

> I started working directly for SAM WHITT from approximately March or April 1991 to September 1991, as a 'drug mule courier' runner. My job was to respond to pager calls from WHITT's drug customer. I would receive a page and then I would respond to the call. I would speak to a

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[16] A lot of people have been named as having worked for defendant. In the presentence report, the government indicated that the members or defendant's organization included Ruby Lamb, Helen Jackson, "Babe" Brock, Necole Lamb, Pernell Hopkins, Cle Rouse, Sherman "Scotty" Johnson, Lavon Chandler, John Starkes, Samantha McCall, Sherrie Hatch and Kay Shelton. During direct questioning by the government at the sentencing hearing, Ruby Lamb indicated that defendant had five people working for him between 1989 and 1992 including "Leroy Shelton and my sister used to sell for him. Mr. Delmore, Helen Jackson [and] Puggy." Since the government has focused its arguments on certain individuals, and since it has the burden of proof by a preponderance of the evidence, the Court too will focus its attention on those individuals.

> person who would order up the type and amount of drugs and then agree to meet with them at a location to deliver the drugs and to receive the money for it. I would then travel to my mother's or aunt's house and pick up the drugs I needed and then make delivery to WHITT's customers. I would then receive the money from them and then return the money to my mother or to SAM WHITT. I made an average of $100 per day from SAM WHITT as a mule runner for him. From the time I started working for WHITT, all the drugs I delivered were his.
>
> * * *
>
> In the Fall of 1992, I started working for WHITT again, selling cocaine to his customers. I did this for approximately two months and made approximately $100 per day. I conducted the drug deals the same way as before, except that I kept the drugs at my house during this time. WHITT also provided the approximate same amount of drugs as before. After two months, I decided that I did not want to be involved with drugs and stopped selling them for WHITT.

(Govt. Ex. 23).[17] Ruby Lamb testified that she took numerous trips with defendant to Florida from 1989 until "right around '91" to purchase kilos of cocaine and to California to purchase black tar heroin; that he would bring heroin and cocaine to her and her sister's (Helen Jackson's) house; that after it was sold (sometime upwards of $15,000 a day) she would place the money in

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[17] In her statement, Nicole Lamb also indicated that during the time that she was selling cocaine for defendant, she also sold black tar heroin for him. She stated during the sentencing hearing that she stood by those statements.

baggies and give it to the defendant; that after she was arrested defendant told her not to worry because he was "going to take care of it, and get the attorneys and pay the attorneys." For all of her efforts, unlike Nicole and Helen she was not paid. Rather, defendant would give her money if she asked for it or (later on) she would skim some of the proceeds. Clearly, the foregoing evidence establishes organizational control over those three individuals.

The government asserts that the evidence submitted to the Court demonstrated the defendant's control over Samantha McCall. On this score, it argues:

> Samantha McCall, testified that she has a daughter by the defendant. She said she began dating the defendant in 1989 and her daughter was born in 1990. She testified that contrary to the testimony of Mrs. Lamb she never worked for the defendant, Sam Whitt. Further, that she never sold drugs.
>
> The government has introduced government exhibit 45 A the transcript of the conversation that took place between Lavon Chandler, the defendant's sister, Samantha McCall and the defendant. Lavon Chandler wants the defendant to come to her location and bring 3 pounds. The defendant wants to know 'what's up' and Chandler gives the phone to Samantha McCall. McCall says 'they want five (5) and Earl want one (1). So they want you to come and set a price. They, he want you to come and set a price, they been waiting on me now. I have been trying . . . " The defendant responds by saying ' . . . I told you, don't always, never let nobody rush ya.'

(Rec. 124 p. 15, internal citations to record omitted).[18] The government goes on to assert that "Exhibit 45A certainly reveals the defendant's control over Samantha McCall and Lavon Chandler." (*Id.*).[19]

In this Court's view, exhibit 45A shows control over Samantha McCall. Standing alone, however, that exhibit may not show the same with respect to Lavon Chandler, although other evidence, to be noted shortly, does.

McCall's request shows indicia of control by defendant over the drug-selling activities of McCall. The request by McCall for defendant to set a price show decision-making authority by defendant – she says that a price needs to be set and shows exasperation that she has been unable to get a hold of defendant although he professes to be all business. In asking about a price, it indicates the nature of defendant's participation in the offense with McCall (and for that matter with Chandler who is looking for an additional three pounds). This is, after all, not a checker at K-Mart calling for a price-check. It suggests that the defendant is the one who gives the orders ("don't always never let nobody rush ya". While

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[18] The tape goes on with Samantha McCall saying that nobody is rushing her but that defendant who claims he is "strictly business" can not be contacted.

[19] The government points out that the conversation in the tape occurred years before Ruby Lamb began to cooperate with the government and as such "corroborates her testimony at the sentencing hearing." Tellingly, however, when Ruby Lamb listed the five individuals that defendant had working for neither of these people was among them unless "Puggy" is a nickname for one of them.

the conversation does not point to defendant's recruitment of accomplices nor to his share of the profits, larger or smaller, all of the factors which have been listed in the cases need not be present.

Although Lavon Chandler's request that defendant bring her "three pound right now" may not alone show that defendant had leadership or control over her, the events around noon on February 7, 1991 in Volusia County Florida do. On that date at that time, Fred Starkes and Lavon Chandler were pulled over on I-95 by a Sheriff's Deputy. After defendant's agreed, the vehicle was searched whereupon more than $340,000 was discovered secreted in luggage in the trunk. Chandler and Starkes were placed in the back of a squad car and, apparently unbeknownst to them, their conversation was recorded. During that conversation those two discussed different explanation for how they came to have their possession such a sum (e.g. Fred's brother always had a good job, Fred had been gambling since he was 19), when the following exchange occurred:

> Chandler: Only thing I know is we just be quiet, quit acting crazy. When they ask, they said we have a right to remain quiet, tell 'em we don't want talk cause we didn't do anything wrong.
>
> Starkes: But what attorney we gonna get?
>
> Chandler: We can deal with that when we get back home, now just say its my money and we don't want to talk to nobody.
>
> Starkes: Say its yours.

Chandler: It don't matter . . . if you wanna say it's mine you can.

Starkes: [Unintelligible]

Chandler: All I'm saying is we don't know.

Starkes: Okay. We should have talked to Sam. We should have talked to him and found out what to do if a situation like this came about.

Chandler: Promise me [unintelligible] don't want anyone to know.

(Ex. 17A).

In his original sentencing brief, defendant pointed out that "neither Chandler nor Starkes ever said the money belonged to Whitt" that the "only reference either of them made to Whitt was that they should have asked him what to do if the situation arose" and that "[t]he only evidence offered in support of this contention was [the] tape which recorded Chandler's conversation with Fred Starkes at the time of the seizure." (Rec. 126 pp. 8 & 9). Were that all, defendant's position would probably be well taken.[20]

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[20] This is particularly so given that "Sam" could be anyone as indicated by the inordinate number of "Sams" in this case. One Sam is Sam Whitt, the defendant. Also mentioned in this case is Sam Hatch. Then there is Samantha McCall (often referred to on the rapes as Sam). Additionally, after Whitt and Lamb were stopped in Florida with the $119,000, defendant is overheard talking to his Uncle Sam (who may be Sam Hatch since Ruby Lamb indicated that he was defendant's uncle). References on the tapes (sometimes in the background) relate to a child named Sam and those references may be to either Samia

But there is more. During her testimony at the sentencing hearing, Ruby Lamb (who has known the defendant "practically all her life," had lived with him for some time, and was deeply involved with him in the drug trade) testified that Lavon Chandler is defendant's sister and Fred Starkes is defendant's cousin. At the time those two were stopped in Florida, Lamb and the defendant were in Miami to purchase drugs. When defendant received a phone call about the $343,000 being confiscated, he became angry and asked Lamb if she had called anybody or said anything about the money. Such evidence points to the conclusion that the "Sam" referenced in the tape taken from the conversations in the back of the police car was defendant and that the money was his. After all, Starkes statements that "we should have talked to Sam [and that] [w]e should have talked to him and found out what to do if a situation like this came about" do not appear to be a suggestion that defendant should have been enlisted as a consultant for advice any more than McCall's queries about pricing suggest that defendant was being used as a sounding board for business decisions.[21] To the contrary, the comments suggest that

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Shelton or Sam Shelton who are listed as defendant's children in the presentence report.

[21] During the search of the residence at 2805 South Lafayette Street, agents found an "IRS Form 3552 addressed to Fred Starkes [sic] assessing $114,627.00 in federal taxes due." It could very well be, as the government asserts in its most recent brief, that the assessment relates to the $343,00.00 seized in Florida and that, as such, the seized funds belonged to the defendant who was the one to decide whether to pay the taxes due on those funds. This obviously would provide even further evidence of defendant's control over Starkes.

defendant was an organizer and a leader, that the money was his, and that Chandler (if not Starkes) was under his control.[22]

In sum, this Court finds that the defendant was an organizer or leader of a criminal activity that included

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[22] In its brief, the government argues that the evidence also shows that the defendant was a leader or organizer of others. Its argument on this score is as follows:

> The defendant is talking to Dezzie Burson about Ruby Lamb being concerned about the defendant and younger women and the defendant says, 'Hey listen at this here I mean they got work to do. Do you hear me?', page 4. On age 5 the defendant goes on to say he has three or four (women) and each of them have a different mission. That way their faces don't become familiar. The defendant admits that he has been with Ruby Lamb for 12-13 years, page 5 Govt. Exh. 44C.
>
> In addition based on the evidence and testimony of Ruby Lamb other participants in the drug distribution organization included his uncle Sam Hatch of Miami, Florida who helped the defendant acquire the drugs from the 'Cubans' in Miami.
>
> Given the above facts and testimony the defendant was an organizer or leader of 5 or more participants and/or the organization was 'otherwise extensive.'
>
> On pages 7 and 8 of Govt. Exh. 44C, the defendant tells Dezzie he is his own best friend, but that he could have an entourage, people lighting his cigarette and opening doors on the scale of Carlos Gambino.

(Rec. 125, p. 6). In the Court's view, whatever the foregoing might show in terms of the "otherwise extensive" prong of section 3B1.1, it does not aid in establishing that the defendant had control over either Sam Hatch or Dezzie.

himself, Ruby Lamb, Helen Jackson, Nicole Lamb, Samantha McCall and Lavon Chandler. That same evidence also shows that the organization which had more than five participants was "otherwise extensive" within the meaning of U.S.S.G. § 3B1.1. As such, the probation office did not err in assessing a four point enhancement for defendant's role in the offense.

Upward Departure

The presentence report indicates that there exists factors which may warrant a departure noting:

> The court could consider an upward departure under §4A1.1 of the guidelines. In Section B above, the defendant had 3 prior convictions which resulted in 9 criminal history points. Mr. Whitt has fourteen other prior convictions which did not receive criminal history points due to the age of the convictions. The defendant has 29 prior arrests establishing a pattern of criminal behavior. He has 6 prior drug arrests which were dismissed. For the above reasons the court may determine that the criminal history score does not adequately reflect the defendant's prior record and depart upward.

(PSR ¶ 108). Even with those observations, the presentence report noted that "[p]resentation of information in this section does not necessarily constitute a recommendation by the probation officer for a departure." (Id. ¶ 109).

Defendant has objected to an upward departure noting that the vast majority of his convictions were for theft (primarily shoplifting), that he has had a substance abuse

problem for 25 years, that given his age and the fact that he is facing a substantial sentence recidivism is not probable, and that the criminal history category of IV adequately reflects his criminal history. For its part, the government's initial response to the objection was "[t]he government agrees with the assessment of the United States Probation Office and will stand on the record in this case." (Rec. 125, p. 16).

Since the government's response was not a model of clarity, the Court inquired further of the government about its position at the last hearing in this matter. In its later filed brief, the government argued that the "matter of an upward departure is dependent upon the final determination of the defendant's offense level." (Rec. 130, p. 12). That is, the government's position is that this Court should upwardly depart if its sentencing determination would place the defendant in any category which would be less that 360 months to life, or life.

Given this Court's conclusion with respect to the objections to the presentence report, the issue of an upward departure is rendered moot. As it now stands, defendant faces a guideline range of life in prison.

Conclusion

Based upon the foregoing, the Court places the amount of drugs for which defendant is responsible to be in excess of 150 kilograms of cocaine making the base offense level 38 Defendant's objections to the presentence report's conclusion that he was not a leader or organizer under § 3B1.1 is overruled and hence four points will be added to his base offense level. An additional two points

will be added under § 2D1.1(b)(1) for possession of a firearm in accordance with the presentence report and his objections to the contrary are overruled. Finally, the issue of an upward departure is moot. Defendant's adjusted base offense level is 43 and his criminal history category is IV.

SO ORDERED this 27 day of July 1998.

/s/ William C. Lee
William C. Lee, Chief Judge
United States District Court